Price Adaptation and the Requirement of Certainty

with specific reference to the contract of sale

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Declaration

I, the undersigned, hereby declare that the work contained in this thesis is my own original work and that I have not previously in its entirety or in part submitted it at any university for a degree.

Date: 18 NOVEMBER 1999

Summary

This study addresses the well-established principle of South African law that a price in a contract of sale must be certain or objectively ascertainable. The interpretation given to this principle by our courts is examined first, and found to be conservative.

This approach is thereupon set against the recognition that parties frequently wish to provide for the possibility of price adaptation. The notion of price adaptation recognises that the latter often contract within a commercial environment fraught with uncertainty, yet wish to agree upon a price term which is both flexible and secure.

An attempt to provide for price adaptation may bring an agreement into conflict with the rule of *pretium certum*. Accordingly, the study addresses the various means by which parties attempt to import price adaptation, whilst, at the same time, ensuring that their agreement does not fall foul of the latter rule. The courts may be of help through the implementation of terms or, as in the case of certain European jurisdictions, through their power to modify agreements following a drastic change in circumstance. Particular attention is given, however, to price adjustment clauses and reference in contracts to the standard of reasonableness. The development of price adaptation techniques depends upon the astuteness of courts in their striking down of agreements on the basis of *pretium certum*.

The study concludes with an analysis of the American approach to certainty of price.

Opsomming

In hierdie proefskrif kom die gevestigde beginsel van die Suid-Afrikaanse Reg dat die prysbepaling ingevolge 'n koopkontrak bepaald of objektief bepaalbaar moet wees, onder die loep. Ten eerste word die hantering van hierdie beginsel in die Suid-Afrikaanse regspraak ondersoek, en tot die slotsom gekom dat die benadering 'n konserwatiewe een is. Die sienswyse van die Suid-Afrikaanse reg word vervolgens gekonstrasteer met die behoefte van die partye aan 'n aanpasbare prys, wat daaruit spruit dat kontrakte dikwels in 'n kommersiële omgewing wat gekenmerk word deur onsekerheid, gesluit word. Afgesien van sekerheid aangaande die prys, bestaan daar ook 'n behoefte aan soepelheid.

Pogings om voorsiening te maak vir prysaanpassing mag die ooreenkoms bedenklik maak vanuit die oogpunt van die vereiste van *pretium certum*. Die proefskrif behandel verskillende metodes waardeur partye te werk kan gaan om prysaanpassing moontlik te maak sonder om die geldigheid van die ooreenkoms in die gedrang te bring. Die howe kan in hierdie verband 'n rol speel vir sover dit die toepassing van prysbepalings aangaan, of andersins deur middel van 'n jurisdiksie om ooreenkomste aan te pas in die lig van veranderde omstandighede. Besondere aandag word gegee aan prysaanpassingsklousules en verwysings in kontrakte na die redelikheidskriterium. Deurgaans blyk die ingesteldheid van die howe van deurslaggewende belang te wees.

Die studie word afgerond met 'n regsvergelykende blik op die posisie in die Verenigde State van Amerika.

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LIST OF ABBREVIATIONS

The usual abbreviations apply for references to South African and Commonwealth case law. Use is made also of the following:

al.	*alinéa*
art.	article
AS	*Annual Survey of South African Law*
BGB	*Bürgerliches Gesetzbuch*
BGH	*Bundesgerichtshof*
BW	*Burgerlijk Wetboek*
Civ.	*Cour de cassation*
DP	*Recueil Dalloz périodique*
JZ	*Juristenzeitung*
LAWSA	*The Law of South Africa*
MDR	*Monatsschrift für Deutsches Recht*
RGZ	*Entscheidungen des Reichtsgerichts in Zivilsachen*
s.	section
SALJ	*South African Law Journal*
Stell LR	*Stellenbosch Law Review*
THRHR	*Tydskrif vir Hedendaagse Romeins-Hollandse Reg*
TSAR	*Tydskrif vir die Suid-Afrikaanse Reg*

CHAPTER ONE: INTRODUCTION

1 1 The general requirement of certainty in the South African law of contract

1 1 1 An established principle

It is an established principle of South African contract law that there must be certainty with respect to the contents of a contract.[1] Contractants are expected, in other words, to determine the obligations to be created by the contract with certainty. This includes both that which is to be performed in terms of the obligation, as well as terms concerning its operation.[2]

This general principle of our law of contract has been confirmed by South African courts for many years.[3] The general acceptance of this principle is such that De Wet & Van Wyk, under the heading 'Die prestasies moet bepaal of bepaalbaar wees', remark as follows:

> Dit spreek vanself dat waar die prestasie of prestasies waartoe partye hulle verbind, so vaag en onduidelik omskryf is dat nie uitgemaak kan word wat die verpligtings is nie, daar uit die ooreenkoms geen verbintenisse kan onstaan nie.[4]

De Wet & Van Wyk's point is clear: if a contract is so vaguely defined that one cannot determine the rights and duties supposedly created, then no rights and duties are created. For if one cannot determine the content of the supposed contract, then surely there can be no contract.

Following the spate of recent cases on certainty, however, this topic merits further discussion. The chapter below accordingly attempts, firstly, to place certainty within the theoretical framework of the law of contract.

1 1 2 Consensus: the requirement of an ascertainable agreement

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1 Wessels *Contract* 22, 137; Van der Merwe et al *Contract* 161; Lubbe & Murray *Contract* 307; De Wet & Van Wyk *Kontraktereg* 83-84; Joubert *General Principles* 179-185; Christie *Contract* 104-113; Hutchison *Wille's Principles* 424; Kahn *Contract* 92-101; Lubbe 1989 *TSAR* 159; Beck 1985 *SALJ* 660; Davids 1965 *SALJ* 108.

2 Lubbe 1989 *TSAR* 159.

3 See, for instance, the recent Appellate decisions *Westinghouse Brake & Equipment Engineering (Pty) Ltd v Bilger Engineering* 1986 2 SA 555 at 574; *Genac Properties Jhb (Pty) Ltd v NBC Administrators CC* 1992 1 SA 566 (A) at 576; and *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd* 1993 1 SA 179 (A) at 182. See in addition *inter alia* the following: *Spiegel v Eilenberg* (1903) 20 SC 247; *Colonial Government v De Beers Consolidated Mines Ltd* (1905) 22 SC 452; *Colonial Government v Barkly West Bridge Co* (1908) 25 SC 124; *Levenstein v Levenstein* 1955 3 SA 615 (SR); *Burroughs Machines Ltd v Chenille Corporation of SA Ltd* 1964 1 SA 669 (W); *Benkenstein v Neisius and Others* 1997 4 SA 835 (C).

4 *Kontraktereg* 83.

The view expressed by De Wet & Van Wyk above is one based on common sense. It can however also be expressed as one sounding in principle. The first step is to recognise that consensus, or reasonable reliance upon consensus, forms the basis of the South African law of contract.[5] From this follows that if the content of an envisaged contract cannot be said to be certain, there cannot to be said to be consensus, and accordingly there cannot be said to be a contract. As observed by Van der Merwe et al, if there is no *ascertainable agreement*[6] concerning the performances or the parties to the intended obligations, no obligations result.

In English law, this point has been well expressed by the House of Lords in *Scammell and Nephew, Ltd v Ouston* as follows:

> In order to constitute a valid contract the parties must so express themselves that their meaning can be determined with a reasonable degree of certainty. It is plain that unless this can be done it would be impossible to hold that the contracting parties had the same intention; in other words, the *consensus ad idem* would be a matter of mere conjecture.[7]

Thus without agreement being ascertainable with a reasonable degree of certainty, it cannot be said that the parties are *ad idem*: that is, of the same mind. Similar sentiment may be found in South African cases such as *Burroughs Machines Ltd v Chenille Corporation of S.A. (Pty) Ltd*, and in *Margate Estates Limited v Moore*.[8]

In general, a basis in the requirement of consensus should be regarded as adequate. Accordingly, a court might see little point in questioning any justification for the requirement of certainty beyond reaffirming that it serves as both a test for, and element of, consensus. Nonetheless, it is may be worthwhile to explore the particular link between certainty and consensus further, and thereby reveal the deeper rationale underlying the requirement of certainty in the South African law of contract.

1 1 3 Party autonomy

It has been said that a fundamental principle underlying the South African law of contract is that of individual autonomy.[9] This notion holds that society is best served when all individuals are equally afforded the greatest possible measure of self-realisation and self-determination in the social and economic spheres.[10] In the particular sphere of law, this

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5 See Van der Merwe et al *Contract* chapter 2 as to consensus or a reasonable reliance on consensus as being the basis of contract in South African law. Also Lotz *Purchase* 362.

6 Or *reasonable reliance* on agreement; Van der Merwe et al, ibid.

7 [1941] AC 251.

8 1964 1 SA 669 (W) at 676B, and 1943 TPD 54 at 59 respectively.

9 See the judgements of Van der Heever JA in *Tjollo Ateljees (Eiens) Bpk v Small* 1949 1 SA 856 (A); *Theron v Joynt* 1951 1 SA 498 (A); *Frumer v Maitland* 1954 3 SA 840 (A). Also Lubbe & Murray *Contract* 20; Lubbe 1989 *TSAR* 170; Lubbe 1991 *TSAR* 13 ff; Harker 1984 *SALJ* 130 ff.

10 E.g. Van der Merwe *Die Duiwel* 16-17; Lubbe 1991 *TSAR* 13. On the principle of individual autonomy see in general Lubbe & Murray *Contract* 20-21 and the references cited therein. For an exhaustive examination of the notion of individualism and its influence on contract, see Atiyah *Rise and Fall* part II, chapters 8-16. Also Friedman *Society* chapter 4, and the references in Lubbe 1991 *TSAR* 13 to Nieuwenhuis *Drie Beginselen van Contractenrecht* (1979).

principle presupposes, in turn, that society is best served by permitting individuals to provide for themselves the consequences of their legal acts. A contract is consequently seen as a mechanism available to individuals whereby this can be achieved. Here individuals must enjoy freedom of contract: the decision whether and with whom to contract, and on what terms, is to be left to the discretion of the contracting parties.[11] Secondly, related to the freedom of contract, and flowing likewise from the principle of autonomy, is the contractual requirement of consensus. The notion of consensuality maintains that contractual liability is in principle dependent on the concurrence of the intentions of the parties to be legally bound to each other.[12] Consequently it is only when there is consensus (i.e. a concurrence of this intention) that the law can be sure that effect is being given to the parties' true intentions, and consequently (and presumably) their interests. The role of the courts in such a system is thus subsidiary; its function is chiefly to ascertain whether the minimum requirements demanded by society for the creation of liability have been achieved, and if so, to enforce the obligations arising from such liability.[13]

Against this background, it can be seen that the principle of individual autonomy lies behind the requirement of certainty, in that certainty is a necessary element for the establishment of the existence of consensus. Where there is no certainty, the law cannot be sure if the parties share consensus; accordingly, it cannot be sure if by giving effect to the supposed agreement (i.e. by attaching to it contractual liability) it will be giving effect to the intention of the parties. This point has already been made by *Scammell and Nephew, Ltd. v Ouston*.[14] This same point, however, is also constantly stressed by the courts when they warn that it is *not their task to make the contract for the parties*.[15] Here, however, the emphasis differs. For on this view, *if* the courts were to give effect to the supposed agreement before them which is characterised by terms which the contractants have failed to set out with sufficient clarity, the court will *necessarily* have to intervene and supply the missing terms themselves. Thus here the emphasis is *not* on the courts giving effect to a *wrong* contract, or one *never intended* by the parties, but rather, on giving effect to a contract made not by the parties but *by the court* itself. Wherever one places the emphasis, the effect is the same: the contract is no longer the parties'. This clearly conflicts with the principle of individual autonomy.[16]

Nonetheless, just as much as the principle of individual autonomy serves to instruct the courts to reject contracts with uncertain terms (for not to do so and to rather intervene and supply certain terms itself would be to make the contract for the parties, or, alternatively emphasised, such rejection is demanded by the requirement of an *ascertainable* consensus), so too it

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11 E.g. Lubbe & Murray, ibid., at 21; Lubbe 1991 *TSAR* 170.

12 E.g. Lubbe & Murray, ibid.; Atiyah *Rise and Fall* 405-408; Friedman *Society* 122-124.

13 Lubbe & Murray, ibid.; Lubbe 1989 *TSAR* 170.

14 Above.

15 See for example *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* 1964 1 SA 669 (W) 676; *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 3 SA 506 (A); *Techni-Pak Sales (Pty) Ltd v Hall* 1968 3 SA 231 (W); *Bellville-Inry (Edms) Bpk v Contintental China (Pty) Ltd* 1976 3 SA 583 (C) 592. Also e.g. Christie *Contract* 108; Lubbe 1989 *TSAR* 159; McKendrick *Contract* 47-48; Beck 1985 *SALJ* 662.

16 See e.g. Lubbe & Murray *Contract* 307 and Lubbe 1989 *TSAR* 170-171 for affirmation of the link between autonomy and certainty.

requires courts, wherever possible, to uphold contracts.[17] If a contract contains terms which may be found to be certain, then this must be found. For after all, autonomy requires that, wherever possible, it is the intention of the parties to be contractually bound to which effect should be given. This approach was stated by Price J in *Hoffmann and Carvalho v Minister of Agriculture* as follows:

> Where parties intend to conclude a contract, think that they have concluded a contract, and proceed to act as if the contract were binding and complete, I think the Court ought rather to try to help the parties towards what they both intended rather than obstruct them by legal subtleties and assist one of the parties to escape the consequences of all that he has done and all that he has intended ...[18]

In this regard, our courts have also found the leading English case of *Hillas & Co Ltd v Arcos Ltd* helpful.[19] Thus in the words of Lord Tomlin:

> [T]he problem for a court of construction must always be so to balance matters, that without violation of essential principle the dealings of men may as far as possible be treated as effective, and that the law may not incur the reproach of being the destroyer of bargains.[20]

And per Lord Wright:

> Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but, on the contrary, the court should seek to apply the old maxim of English law, *verba ita sunt intelligenda ut res magis valeat quam pereat.* That maxim, however, does not mean that the court is to make the contract for the parties ...[21]

Thus to refuse to make contracts for parties but also to endeavour to uphold contracts, is to give full effect to the principle of autonomy. This represents a key tension in the law in this area.[22] Application of the latter may be difficult: ascertaining terms and thus upholding the contract may at times not be easy. To fail to attempt to do so, however, and thus invalidate the contract on the grounds of vagueness would be to lose sight of the fact that agreement has indeed been reached. This judicial distancing[23] by the courts from the fact that the parties

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17 Christie *Contract* 105; Beck 1985 *SALJ* 661; Kahn *Contract* 92; Hawthorne 1992 *THRHR* 638; Hutchison *Wille's Principles* 424; Wessels *Contract* § 138.

18 1947 2 SA 855 (T) 860. Also e.g. *Collen v Rietfontein Engineering Works* 1948 1 SA 413 (A) 428; *Shell SA (Pty) Ltd v Corbitt and Another* 1986 4 SA 523 (C) 529; *Globe Electrical Transvaal (Pty) Ltd v Brunhuber and Others* 1970 3 SA 99 (E) 105; *Burroughs Machines Ltd v Chenille Corporation of South Africa Ltd*, above, 670; *Novick and Another v Comair Holdings Ltd and Another* 1979 2 SA 116 (W) 131; *Lindner and Another v Vogtmannsberger and Another* 1965 4 SA 108 (O) 110.

19 [1932] All ER 494 (HL), (1932) 147 LT 503. See e.g. *Globe Electrical Transvaal (Pty) Ltd v Brunhuber and Others*, above, at 105; *Burroughs Machines Ltd v Chenille Corporation of South Africa Ltd*, above, at 671.

20 499I.

21 503H-J.

22 See e.g. Beck 1985 *SALJ* 661; McKendrick *Contract* 48 ff.

23 Beck, ibid., at 662.

have indeed reached agreement, no matter how cumbersome this may be to determine, is apparently to be avoided to the same extent as is the case of a court supplying the parties with the content of their contract. In the latter case, autonomy is no less threatened by the courts giving effect to contracts which essentially are no longer the parties'.

1 1 4 Certainty as a separate requirement

It has not yet been finally decided whether certainty of content constitutes a distinct and substantive requirement for the validity of a contract, or whether it is merely an incident of some other requirement for contractual validity.[24]

Some modern writers tend to treat certainty as a distinct requirement, as would appear to be the view of the courts.[25] Other commentators view it as merely an incident of the requirement of consensus,[26] while certainty has also been treated as a necessary element of offer and acceptance.[27]

The tendency to subsume certainty under the rules of offer and acceptance appears doubtful. Firstly, as commented upon by Van der Merwe et al, the issue of certainty may arise even in the context of contracts which do not reveal a discernible offer and acceptance.[28] Secondly, although it is required that offer and acceptance must result in certain terms, the existence of an offer and acceptance is itself not a substantive requirement for a valid contract, but rather constitutes the facts from which consensus may commonly be inferred.[29] This view could therefore be seen to serve the standpoint that certainty amounts to nothing more than an element of the consensus required between the parties. This latter standpoint holds that without certainty with respect to the content of an envisaged contract, the parties cannot be held to be *ad idem*.

In the light of the discussion above at **1 1 2**,[30] much can perhaps be said for this latter approach. In particular, consensus has been said to comprise (a) an agreement by the parties on the consequences they wish to create by the envisaged contract (that is, the contents of the contract, namely, the rights and duties), (b) an awareness of this agreement, and (c) an

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24 See here in general the discussion in Van der Merwe et al *Contract* 161.

25 Compare e.g. De Wet & Van Wyk *Kontraktereg* 93; Joubert *General Principles* 179 -185; Wessels *Contract* § 422 ff; Beck 1985 *SALJ* 660; Davids 1965 *SALJ* 108; Lubbe & Murray *Contract* 20, 307. Regarding our courts see e.g. *Colonial Government v De Beers Consolidated Mines Ltd* (1905) 22 SC 452; *Levenstein v Levenstein* 1955 3 SA 615 (SR); *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* 1964 1 SA 669 (W).

26 Hosten et al *Introduction* 384.

27 Van Rensburg et al *LAWSA V* par 130; Kahn *Contract* 92 ff; Kerr *Contract* 83 ff.

28 *Contract* 161 n 6.

29 Van der Merwe et al, ibid., at 42; Lubbe & Murray *Contract* 307. A distinguishable offer and acceptance is moreover useful in demarcating the line between pre-contractual contractual negotiations and the final conclusion of a binding contract, and thus determines the point up until which a party may withdraw. Furthermore, where a contract is said to be concluded i.e. in terms of the rules of offer and acceptance, may also determine which court has jurisdiction in the event of litigation. See here Van der Merwe et al, ibid.

30 Also *Ankon CC v Tadcor Properties (Pty) Ltd* 1991 3 SA 119 (C) 124.

intention to bind themselves in law to these consequences.[31] Element (a) is clearly a prerequisite for the existence of elements (b) and (c). Thus if there is in fact uncertainty with regard to (a), that is, the contract's content, how might it at all be said that the parties could reach consensus? It appears, therefore, that certainty is an indispensable element of consensus. Moreover, one encounters no suggestion as to in what manner or way certainty might be indispensable *outside* of the context of the role it plays as a necessary element of consensus.

It will, however, be admitted that most authorities, while never attempting to set out their reasons for doing so, do nonetheless treat certainty as a separate requirement. This may well simply amount to the pragmatic recognition by these writers that certainty, whether viewed as a separate requirement or not, is a vital component of any contract. It is thus possibly best at this stage, while the question remains unanswered, to agree with Van der Merwe et al that, irrespective of the approach taken, lack of certainty presents an obstacle to the creation of contractual obligations.[32]

1 1 5 The test for certainty

The test for certainty is whether the rights and duties created by the contract are capable of enforcement by the courts.[33] It is furthermore said that this is the only test for certainty, and it applies irrespective whether the contract is written or not.[34] The court will, in establishing whether the requirement of certainty has been met, take into consideration all the express and tacit terms of the contract, including those established by custom, as well as any other terms, such as *naturalia*, implied by law.[35] Where necessary, and subject to the parole evidence rule, reference may be made to extrinsic evidence to establish the true content of a contract.[36]

It is suggested that, on the one hand, this test follows from the subsidiary or supplementary role that the law, and the courts in particular, are required to play by the principle of individual autonomy. It has been said already that the function of the court is chiefly (i) to ascertain whether the minimum requirements demanded by society for the creation of liability

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31 This division is taken from Van der Merwe et al *Contract* 14.

32 Van der Merwe et al, ibid., at 161.

33 *Estate Fuchs v D'Assonville* 1935 OPD 165; *Colonial Government v De Beers Consolidated Mines Ltd* (1905) 22 SC 452; *Patel v Adam* 1977 2 SA 653 (A) 666; *Lindner and Another v Vogtmannsberger and Another* 1965 4 108 (O) 110; *Caltex (Africa) Ltd v Robin Rissen & Co (Pty) Ltd* 1965 2 SA 154 (W) 156; *Dijkstra v Janowsky* 1985 3 SA 560 (C) 564. Also Van der Merwe et al *Contract* 162; Lubbe & Murray *Contract* 314; Wessels *Contract* § 422, § 426; Beck 1985 *SALJ* 660; Hawthorne 1992 *THRHR* 638; Lubbe 1989 *TSAR* 171.

34 See Van der Merwe et al, ibid.

35 Lubbe & Murray *Contract* 314; Van der Merwe et al *Contract* 162; Hawthorne 1992 *THRHR* 641. See the case law cited in the footnote immediately below.

36 Ibid. See in particular the approach of the court in *Lindner and Another v Vogtmannsberger and Another*, above, at 110E-111H, and the remarks of the court in *Shell SA (Pty) Ltd v Corbitt and Another* 1986 4 SA 523 (C) at 529E. See in addition *Caltex (Africa) Ltd v Robin Rissen & Co (Pty) Ltd*, above, at 156G; *Pattison and Another v Fell and Another* 1963 3 SA 277 (D) 279A-280B; *Turner Morris (Pty) Ltd v Riddell* 1996 4 SA 397 (E) 405E-F; *Du Preez v Nederduitse Gereformeerde Gemeente, De Deur* 1994 2 SA 191 (W) 196F-197C; and the additional authorities cited in Lubbe & Murray, ibid., at 314.

have been met, and if so, (ii) to enforce the obligations arising from such liability.[37] With regard to the test for certainty and point (ii) there can be little dispute. If the courts are to enforce the obligations arising from contracts established between parties, it stands to reason that they must be in a position to do so. In other words, the content of a contract must be certain enough for a *court* to enforce. The test for certainty, accordingly, is, in this sense, understandably a practical and pragmatic one.[38]

Point (i), however, is less self-explanatory. If certainty is a minimum requirement (as, perhaps, a required element of consensus) demanded by society for the creation of contractual liability, why precisely is its test whether it is enforceable by the courts? Why in particular is this so in the light of the importance of individual autonomy in our law of contract, and the emphasis placed on the importance of giving effect to the intentions of the parties? Should not, for instance, the minimum requirement be whether the *parties* regard terms of a contract as sufficiently certain so as to allow them to deduce what performance is required of themselves and each other?

For it is possible that the contents of many contracts are defined so poorly that the courts, in applying the prescribed test for certainty, would find them impossible to enforce. Many of these contracts however, no matter how vague their terms may be, at least to outsiders, are satisfactorily performed.[39] These contracts simply never come to the attention of the courts. Do, therefore, no obligations result from such contracts, because they would not be regarded as enforceable by the courts? After all, if certainty - as determined by the enforceability of the courts test - is a minimum requirement before contractual liability attaches to the agreement, then no contractual liability should follow. Do such supposed contracts accordingly fail because they would not pass the test set of certainty set for all contracts? The answer, surely, would be no.[40] But then what is the nature of this test? Why should it apply to some agreements and not others? Can it at all be said to be a *substantive* test against which *all* agreements should be measured? Would there be any justification, for instance, in regarding the enforceability by the courts test as (merely) an attempt to produce an objective, uniform measure against which certainty can be judged in those (relatively few) cases where the certainty of the contract's content is disputed and thus where this dispute comes up before the court?

These questions are merely raised at this stage. Hopefully, possible answers will emerge in the course of this study. Importantly, however, such questions lead one to identify that here too

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37 See the discussion under 1 1 3 above.

38 See again the remarks by De Wet & Van Wyk cited at 1 1 1 above. Also *Scammell and Nephew, Ltd v Ouston* [1941] AC 251 per Lord Russell of Killowen (cited in e.g. *Pattison and Another v Fell and Another* 1963 3 SA 277 (D) 279B-C): 'It is a necessary requirement that an agreement, in order to be binding, must be sufficiently definite to enable the Court to give it a practical meaning'. Also Hutchison *Wille's Principles* 424, where it is said that the reason for the rule on certainty is that clearly no court can enforce an obligation if it is unable to determine the rights and duties of the parties, and Corbin *On Contracts* 525.

39 See the observations by Beck in 1985 *SALJ* 661.

40 See *Enyati Resources Ltd and Another v Thorne NO and Another* 1984 2 SA 551 (C) at 560B where the court stated that '[t]he law, I am inclined to think, might justifiably be labelled an ass were it to strike down as void for vagueness or uncertainty a contract which the parties thereto have fully performed to their mutual satisfaction'.

there exists a fundamental tension in our law in this area. This tension arises from the fact that there can exist a *discrepancy* between what the parties might view as terms in an agreement sufficiently certain as to be enforceable (or in their view perhaps, exigible) and what the court might think in this matter. In our law, for better or for worse, where this view determines *the content of the test for certainty* in the law of contract, the latter view is held to be decisive.

1 1 6 Attaining certainty

It is generally accepted that parties can attain certainty in two ways: the parties firstly may themselves define the content of a contract fully and exhaustively, or alternatively they may identify an external standard by which the precise content of the contract may be objectively ascertained.[41] This is in accordance with the maxim *id certum est quod certum reddi potest*: that is certain which can be made certain.[42] Thus in *Boland Bank Bpk v Steele* it was said:

> Die fundamentele terme van 'n kontrak moet of by wyse van uitdruklike ooreenkoms bepaal word of bepaalbaar wees aan die hand van 'n objektiewe feit (wat ook gewoonte of gebruik kan insluit) of deur 'n derde persoon.[43]

The identified external standard must apparently by itself be capable of determining the content of the contract, and no further reference to the parties should be necessary.[44] The ostensible ratio underlying the recognition of ascertainability alongside immediate certainty is that it may at times be impracticable or undesirable for the parties to define immediately the rights and duties arising from the contract.[45]

1 2 Certainty of price in contracts of sale

1 2 1 The development of a general law of contract

Up until this point, the requirement of certainty has been considered within the context of the general principles of contract. A general law of contract is, however, a relatively recent phenomenon. For legal systems with a history in the Roman law of contract, it was only from approximately the 18th century that it could be said that there existed a general law of

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41 Lubbe & Murray *Contract* 314; Van der Merwe et al *Contract* 162; Wessels *Contract* § 426; Hutchison *Wille's Principles* 424; Joubert *General Principles* 179; Hawthorne 1992 *THRHR* 638. Confirmation may likewise be found in numerous decisions of our courts. For specific authority that this is a general principle of contract (as opposed to the position pertaining to terms in specific contracts such as sale, for which see 1 2 3 below) see amongst others *Genac Properties Jhb (Pty) Ltd v NBC Administrators CC* 1992 1 SA 566 (A) 576I; *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 2 SA 555(A) 574D; *Lindner and Another v Vogtmannsberger and Another*, above, at 110F; *Grobler v Naude* 1980 3 SA 320 (T); *Djikstra v Janowsky* 1985 3 SA 560 (C) 564H-I.

42 *Digesta* 12 1 6; *Digesta* 45 1 74.

43 1994 1 SA 259 (T) 274J.

44 See in particular Lubbe & Murray *Contract* 314; Van der Merwe et al *Contract* 162-163.

45 Van der Merwe et al, ibid., at 162.

contract.[46] Before this, the maxim *ex nudo pacto non oritur actio* held sway. In its purest sense, this meant that no *pactum* or contract was enforceable[47] if it failed to fall within one of the specific forms of contract, which together formed a recognised *numerus clausus*. Pure Roman contract law was consequently a law of contracts, not contract.[48] It was from the specific rules pertaining to these specific forms of contract, however, that the law, during the course of centuries, gleaned the principles that were made applicable to all contracts.[49] Today, however, the development and acceptance of the latter is such that Lubbe & Murray are able to observe that the 'general principles apply to all contracts, irrespective of the context in which they are concluded'.[50] At the same time, nonetheless, there is also recognition that there continues to exist in South African law a number of specific contracts, such as sale, lease and suretyship, and which have largely developed directly from the specific contracts of Roman law.[51] While these specific contracts are governed by general principles, it is acknowledged that they are to a certain extent subject to special rules.[52] This study accordingly focuses on one such specific contract, viz. that of sale.

1 2 2 Why certainty of price in the contract of sale?

The contract of sale, or *emptio et venditio*, has long been recognised in South Africa as an example of a specific contract existing in our law.[53] Its origins are clearly to be found in both Roman and Roman-Dutch law,[54] and it has further been remarked upon how little the basic South African contract of sale has changed in the last three hundred years, that is, since Roman-Dutch times.[55] Moreover, in accordance with the general principles of contract, the terms of a contract of sale are also expected to be fixed with certainty. One of the essential terms of this type of contract is a price;[56] thus price in a contract of sale is likewise subject to

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46 Zimmermann *Obligations* 539. For an analysis of the development towards a general law of contract in civilian systems, see in general Zimmermann, ibid., at 537-545. See also Joubert *General Principles* 24-35 for a South African slant.

47 That is, no action was given.

48 Joubert *General Principles* 24.

49 See for instance, Zimmermann *Obligations* 537-8 on the glossators and their early attempts to sift Roman contracts (as found in the *Digesta*) into a rational scheme. See thereafter 540-545 for the contribution of commercial practice and canon and natural law to the eventual acceptance of a general law of contract based on consensus. See also 32 where Zimmermann states, with reference to his plan of treatment regarding contract of the civilian tradition, that his discussion would commence with the special contracts before it focused on the general doctrines, as this progression from the concrete to the more abstract and general would appear to accord best with the way the Roman lawyers developed their law of contractual obligations.

50 *Contract* 20.

51 See for example Lotz *Purchase* 361 on the position of sale.

52 Lubbe & Murray *Contract* 20. Also De Wet & Van Wyk *Kontraktereg* 5; Hahlo & Kahn *Legal System* 122-123.

53 See the standard textbooks on sale, including those by Mostert, Joubert & Viljoen, Mackeurtan, Kerr and Norman. See also Lotz *Purchase* 361; Lubbe & Murray, ibid., at 20; and Hahlo & Kahn, ibid., at 123.

54 See *inter alia* Mostert et al *Koopkontrak* 4; Lotz, ibid., at 361.

55 Lotz, ibid.

56 See Lotz *Purchase* 362 for a discussion on the mild controversy as to what constitutes the *essentialia* of a contract of sale.

certainty.[57] Furthermore the contract of sale is, in this highly commercialised world, a commonly encountered and greatly utilised legal tool; the importance of it operating effectively as such, speaks for itself. What follows therefore is an examination of the principles governing certainty of price in the South African law of sale.

1 2 3 The rule of pretium certum

Price is an *essentialé* of a contract of sale: *nulla emptio sine pretio esse potest.*[58] In the words of Corbett JA:

> It is a general rule of our law that there can be no valid contract of sale unless the parties have agreed, expressly or by implication, upon a purchase price.[59]

Accordingly, without agreement on price there can be no valid contract of sale, although the agreement may be enforceable as some other type of contract.[60] As required of all contractual terms in general, the price in a contract of sale must furthermore be certain:

> The Roman requirement that the purchase price must be certain - in the sense of being at least ascertainable by reference to some objective standard - has never been questioned in South African law.[61]

Thus parties attain certainty of price by either making price immediately certain or by providing for its ascertainment by reference to objective standards.[62] This, in principle, is likewise no different from the general provision governing contractual terms.

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57 See the discussion at 1 2 3 below and the authorities cited there.

58 *Institutiones Justiniani* 3 23 1.

59 *Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 2 SA 555 (A) at 574B. Also e.g. *Genac Properties Jhb (Pty) Ltd v NBC Administrators CC* 1992 1 SA 566 (A) 576; *Adcorp Spares P.E (Pty) Ltd v Hydromulch (Pty) Ltd* 1972 3 SA 663 (T) 667; *Burroughs Machines Ltd v Chenille Corporation of S.A (Pty) Ltd* 1964 1 SA 669 (W) 670; *Reymond v Abdulnabi and Others* 1985 3 SA 348 (W) 349. In general Wessels *Contract* § 4442; Kerr *LAWSA XXIV* par 13; Lotz *Purchase* 362; Mostert et al *Koopkontrak* 6; O'Donovan *Mackeurtan's Sale* 28; Belcher *Norman's Purchase* 2.

60 See Van der Merwe et al *Contract* 200.

61 Lotz *Purchase* 367. See the authorities cited by Lotz and in addition the authorities cited in the footnote immediately below.

62 *Stead v Conradie en Andere* 1995 2 SA 111 (A) 123; *Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 2 SA 555 (A) 574; *Burroughs Machines Ltd v Chenille Corporation of S.A (Pty) Ltd* 1964 1 SA 669 (W) 670; *Reymond v Abdulnabi and Others* 1985 3 SA 348 (W) 349; *Shell SA (Pty) Ltd v Corbitt and Another* 1986 4 523 (C) 526; *Aris Enterprises (Finance) (Pty) Ltd v Waterberg Koelkamers (Pty) Ltd* 1977 2 SA 425 (A) 434; *SA Reserve Bank v Photocraft (Pty) Ltd* 1969 1 SA 610 (C); *Adcorp Spares PE (Pty) Ltd v Hydromulch Ltd* 1972 3 SA 663 (T); *Hattingh v Van Rensburg* 1964 1 SA 578 (T) 582. Also Wessels *Contract* § 4446; Kerr *LAWSA XXIV* par 16; Kerr *Sale* 29, 33; Belcher *Norman's Purchase* 65; O'Donovan *Mackeurtan's Sale* 45; Joubert *General Principles* 179; Mostert et al *Koopkontrak* 10; Lotz *Purchase* 367; Coaker & Zeffertt *Mercantile Law* 188; Van Jaarsveld *Handelsreg* 298.

The statement that the parties themselves may set a certain price has given rise to few problems. Usually this would be done expressly, as when the price is to be found in a deed of sale, or when expressed as a term in an oral contract after prolonged negotiations between the parties.[63] There is however no reason in principle why a tacit term pertaining to price might itself not be sufficiently certain. This might occur where two parties agree on a sale and, whilst failing to expressly mention a price, are *ad idem* on the price because they both know precisely the value of the item because of its unusual character or value.

More problematic however, has been the rule that a price may be regarded as set when the parties agree to make the price ascertainable or determinable. The flexibility that can be given to the parties without consigning their contract to a fatal vagueness is a vexed question. Writing generally with regard to the validity of contracts in which the parties have provided an external standard for the determination of the content of performance, Hawthorne has observed that methods of ascertaining performance have been accepted in case law, and are still in the process of evolving.[64] It is noted by Hawthorne, however, that there has yet to be recognised a set of principles by which a particular method of determination or ascertainment may be evaluated. Accordingly, as a result of this absence of clear guidelines, parties who make use of a method which provides for the later ascertainment of performance, and who do not provide for immediate certainty to be afforded to that term, run the constant risk of their contracts being declared void for vagueness.[65]

It would appear that the statement that with regard to methods employed to achieve the later ascertainment of contractual terms in general, our law is still evolving, and that it lacks at present a coherent set of principles, applies equally to the ascertainment of price. Indeed Hawthorne regards this as particularly true of contracts of sale and lease where, she notes, it is common practice to relate the amount payable to external factors.[66] This, moreover, might appear from the fact that, as a possible result of the absence of such principles, our law's approach to the problem has been, to date, a very casuistic one. This casuistry is apparent from a glance at leading textbooks on the law of sale. Mostert, Joubert & Viljoen's *Die Koopkontrak*, Kerr's *The Law of Sale and Lease*, the most recent edition of *Norman's Purchase and Sale in South Africa*, and the volume on sale in the *Law of South Africa*[67] are all content to list various methods of price ascertainment used by parties in practice and to state whether these have been accepted by the courts or not. Recent editions of *Mackeurtan's Sale of Goods*, likewise, treat ascertainment in as casuistic a manner, and state simply that what is important is that it should be possible to ascertain the price by the method agreed upon.[68] For principles, one looks in vain.

But to what extent is such casuistry, to complete Hawthorne's point, indeed dangerous? For on a second glance at the standard works on sale, one notes the richness of case law on the

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63 See e.g. Kerr *Sale* 33.
64 Hawthorne 1992 *THRHR* 638. See also Beck 1985 *SALJ* 662.
65 Hawthorne, ibid.
66 Ibid.
67 Mostert et al *Koopkontrak* 11-12; Kerr *Sale* 34; Belcher *Norman's Purchase* 65; Kerr *LAWSA XXIV* par 16. See also similar treatment in textbooks on contract in general such as Joubert *General Principles* 179, and Hutchison *Wille's Principles* 530.
68 O'Donovan *Mackeurtan's Sale* 45; Hackwill *Mackeurtan's Sale* 15.

point of ascertainment of price. One might expect, then, that over the years, a set of case law has accumulated which, whilst never having set out the principles applicable with the coherency required of by Hawthorne, provide adequately of sound precedent, to cover either directly or by analogy all questions of law arising in the field of ascertainment of price. One would expect, further, that particular cases themselves have come to be identified as leading cases in this field, having themselves elucidated principles which consequent decisions have recognised as sound, and to which later courts continue to turn to for guidance. Is it not, therefore, through this very diversity of South African case law, and the influence of leading cases, that the factors to be taken into consideration by the modern purchaser or seller - and his or her lawyer - in their drawing up of contracts and their accompanying agreement on price, have been indicated adequately? This possibly depends upon one's view on the correctness of the approach taken by South African courts to this issue, and the principles such cases divulge. Accordingly, an examination of a leading case on the ascertainment of price - if not perhaps the leading case - may give one an indication of the manner of thinking upon which much of South African case law may be expected to have been based.

1 2 4 The Burroughs *case*

Burroughs Machines Ltd v Chenille Corporation of S.A. (Pty) Ltd[69] is a case cited with great frequency by our courts with regard to the ascertainment of price. It deals explicitly with the problem, and at considerable length. It may be expected, therefore, to demonstrate the correct approach to be taken when faced with the issue of *pretium certum.*

In casu, the plaintiff sued the defendant for the alleged contract price of certain machinery sold to the defendant. In defence it was denied, *inter alia*, that there was a contract of sale in that there could not be said to have been a fixed contract price. It was this question, namely, whether there was a price or not, upon which the court chiefly focused its attention.

With regard to price, the contract document included, firstly, the following phrase, which the court identified as Part II:

> To be delivered to the undersigned as soon as possible, transportation charges pre-paid, which the undersigned agrees to purchase for the sum of £1,371,12s. (one thousand three hundred and seventy-one pounds twelve shillings).

This figure was also to appear elsewhere in the document alongside the printed words 'approximate nett total'. Thereafter the document provided for the following two clauses, and which were referred to by the court as Parts III and IV:

> Part III
>
> It is not possible for Burroughs Machines Limited, hereinafter called the Company, to quote a firm price for the new equipment offered on this order. We are informed by our factory that the price quoted as 'approximate' is not final and is subject to change at any time prior to delivery,

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69 Above.

> to provide for possible changes in manufacturing costs, and fluctuations in the rate of exchange.[70]
>
> Part IV
>
> Any increase in respect of any taxes, tariffs or rates, imposed prior to delivery, shall be borne by the purchaser.[71]

The court, at outset,[72] set out the principles of law which it evidently believed to be applicable in this case. The first of these is that there can be no valid contract of sale without a price, and that the fixing of price could in turn either be done expressly by the parties or by their 'agreeing upon some external standard by the application whereof it will be possible to determine the price without further reference to [the parties].'[73] Secondly, as apparently a corollary to the first, the court stated that there could be no valid contract of sale if 'the price [was] to be fixed by one of [the parties] or his nominee.'[74]

In applying this law to the facts, the court clearly regarded the contract to have provided for ascertainment of the price by way of an external standard, that is, that it attempted to provide 'machinery for fixing the price',[75] and that the parties had not themselves attempted to provide expressly for an original, fixed price.[76] The court ruled however that the price-fixing machinery had failed to indicate 'with sufficient clarity'[77] the circumstances under which, and to what extent, the approximate price, which was itself never intended to be a firm or final price, would be adjusted. The circumstances referred to included changes in manufacturing costs,[78] fluctuations in the rate of exchange,[79] and references to rates and taxes.[80] The court looked at various possible price adjustments that it believed could conceivably result from the ascertainment clauses, and, because the possibilities appeared so many, held the terms constituting the price-fixing machinery as 'too vague for enforcement'.[81] The court consequently concluded that the parties had failed to reach agreement on a vital term of the contract, namely, price, and that therefore there was no contract of sale at all.[82]

The case appears accordingly, at first glance, to be a classic tale of a price ascertainment mechanism gone wrong. The price-fixing machinery failed to achieve the certainty required by the court for a material term; it gave rise to too many possibilities with regard to price. Faced with all these possibilities, no court could know what price to enforce; as Colman J remarked, '[i]t is to be regretted that [the contract's draftsman had] not devote[d] equal care to

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70 672D.
71 672E.
72 670C-F.
73 670D.
74 670E.
75 675D.
76 See for example 675H.
77 673A.
78 673B.
79 674B.
80 674F.
81 675A.
82 676B.

the necessary task of ensuring that the amount of the purchase price would be clearly reflected or indicated'.[83] As evidence of this lack of care the court spent some considerable time sketching the many consequences it believed could result from what it regarded as the loose-endedness of the clauses regarding the price ascertainment mechanism.[84]

The case, therefore, does indeed appear to be a model for the proper approach to *pretium certum*: the law, that a price must be certain or ascertainable, is carefully set out;[85] the court then makes it clear that the parties have elected to make the price ascertainable by way of price-fixing machinery;[86] and this machinery is then gauged against the standard test for certainty, viz. whether it results in a term enforceable by the court.[87] The outlook is decidedly throughout that of the court's, with the latter in its role as curator of the unquestioned requirement of certainty. It is little wonder then that the case is cited so frequently as precedent with respect to this area of the law of sale.

And yet one finds the case strangely disquieting.

For the first question is to ask why, in the first place, the defendant found himself in court. This was apparently because he was allegedly in breach[88] - for failing to pay the purchase price of the bought machinery. Considering that the case chiefly concerns whether there was certainty with respect to the purchase price, the ordinary bystander (ignorant of the complexities of our law) could reasonably expect the defendant's alleged failure to pay to be as a result of his inability to determine the exact price to be paid by him. But this, of course, is hardly the case. For whatever reason he is allegedly in breach, it is not because of an inability to determine what he owed in terms of the contract. The court notes[89] that the plaintiff was not claiming anything more than the approximate price set out in the contract, which, he says, 'was presumably acceptable to both parties'. In this *obiter* remark, the court (as well as a complete lack of any indication whatsoever in the rest of the judgement that the defendant, during the duration of the contract, was in any doubt as to what he was expected to pay) indicates that, in so far as the *parties* are concerned, there existed no problem whatsoever as to the *quantum* of the price. The defendant throughout the duration of the contractual relationship clearly knew what was expected of him. And yet this supposed uncertainty as to this very same price is then permitted to render the entire contract void. It is little wonder then that the court terms its conclusion, which it believed it was obliged to follow,[90] as 'unfortunate'.[91] This is especially so if one considers that the court gave some considerable attention to the correct approach to be taken when concerned with commercial documents and

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83 671H.
84 673B - 676A.
85 670D-E.
86 See for example 673A.
87 See for example 675A; 676B-C.
88 669G.
89 676C.
90 '[B]ut I must apply the facts and the law, as I find them ...' at 676C.
91 676C.

the required degree of certainty,[92] and that it had stated itself that it should 'not lightly hold the document to be ineffective'.[93]

It is in such a case, accordingly, that one questions whether the courts take into adequate consideration the discrepancy that can exist between the court's view of what is enforceable, and hence certain, and the view of parties as to what is certain, or, from their perspective, capable of implementation. In the *Burroughs* case, there is no indication whatsoever that the parties failed to regard the contract as capable of implementation. Contrary to the view taken by Colman J, a strong argument could be made out that on its correct interpretation, the figure of £1,371,12s. was a binding price, provisional only in the sense that it was subject to possible (but not inevitable) change. Parts III and IV are clearly more in the nature of escalation clauses (i.e. clauses that provide for *later* adjustment to an *original* price), rather than clauses to be considered in the *initial* determination of the original price. This is particularly so on a reading of Part I, read with Part II. Clearly, unless there occurred some change in, for example, manufacturing costs, respondent was to pay the sum of £1,371,12s. The later sum appears to constitute a great deal more than, as in Colman J's view, a mere *datum* to be used in computing the true price.[94] In the event, as plaintiff claimed only the supposedly approximate price (that is, £1,371,12s.), there was no change, and thus there was no reason why the latter price should not have stood. Colman J, however, was not unduly interested in the fact that there *had* been no change, and that consequently, the court was open to find for a contract *enforceable* on the price of £1,371,12s. (and thus one which *in practice* passes the enforceability of the courts test). Rather, although on the facts it was a completely hypothetical issue as there had been no change in, for example, labour or manufacturing costs, the judge appeared more interested in the fact that the method of computation and the data required had not been provided for *in the event* that there was indeed such a change, and indeed, what precise circumstances constituted such a change. Thus the requirement of certainty takes on a life of its own; it becomes a lawyer's point,[95] a convenient means of escape for a party from the contractual obligations to which it had intentionally bound itself, and the import of which it itself had little doubt. *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd*, therefore, is a leading case not so much for the clarity it brings, but for the issues it raises. Hawthorne's warning would seem to be one to be heeded.

1 3 The way ahead

This introductory chapter has attempted to place the requirement of certainty firstly within the wider context of the law of contract, and thereafter, within the context of price in the contract of sale. It suggests that, in principle, certainty is an indispensable requirement for any contractual term on price before the law will recognise the existence of consensus between the parties regarding the latter. This in turn gives effect to the principle of individual autonomy which underlies our law of contract. Moreover, price is apparently regarded as sufficiently certain where it is made immediately certain, or where it is made objectively ascertainable.

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92 670F - 671C.
93 670G.
94 675H.
95 *Namibian Minerals Corporation Ltd v Benguela Concessions Ltd* 1997 2 SA 548 (A) 557C.

At this point, it has furthermore been suggested that our law is characterised by two key tensions. The first is that courts are to refuse to make the contract for the parties whilst at the same time they must endeavour to uphold contracts intended by the parties. The second tension is, essentially, a complication upon the first. This is that, inevitably, the view of the parties as to what constitutes a certain price may differ from that of the court. To this a third element may be added, viz. that the test of certainty is whether the content of the agreement is enforceable by the courts.

Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd is a leading case on the rule of *pretium certum* in South African law. Before the discussion of this case, it may have been supposed that the requirement of certainty of price was a relatively straightforward one; it could have been expected, for instance, that in leading case law such as this all possible problems arising from this requirement had been resolved. In the *Burroughs* case, however, *pretium certum* is shown to be a rule pulled by these very tensions, and from the analysis of the case in the previous section, it appears that some of these tensions may not necessarily have been adequately resolved.

Clearly therefore, such wrestling with tensions in a case such as *Burroughs* demonstrates that the rule of *pretium certum* is a question more complex than perhaps initially thought. In particular, it recalls the remark, cited earlier, that the rule that the purchase price must be certain, at least in the sense of being ascertainable by reference to some objective standard, has never been questioned in South African law.[96] For if this is the case, one wonders, especially in the light of these tensions, why this has in fact been so. There is, however, a deceiving matter-of-factness, a self-evidential quality to a statement that observes that contractants must agree upon certain terms and that the test for the latter is whether the contract is enforceable by the courts. In its evaluation, however, as to whether price is enforceable, and thus sufficiently certain, the court is surely obliged to look *beyond* the statement of the requirement and its accompanying test to the rationale underlying the former, and the accompanying issues and tensions.

From our examination of *Burroughs*, a leading case, one wonders if this is in fact being done. In *Burroughs* for instance, the courts showed a keen appreciation of the first tension; that is, that while it must strive to uphold the intended contracts of parties, it must refrain from making the contract for them. On the other hand, it appeared to show little appreciation for the fact that its perception of certainty of price differed remarkably from the parties, and yet its perception formed the test for certainty which it then applied. Perhaps the most obviously dissatisfactory element of the judgement is that the 'proper' application of this test then results in one party exploiting the rule of *pretium certum* so as to escape the consequences of his liability. One considers therefore whether in fact our courts do demonstrate a sound understanding of all that underlies *pretium certum*. The rule may seem clear enough, as it did in *Burroughs*, but not necessarily its rationale. One may ask, for instance, when a court has explicitly questioned why price, if not immediately certain, must be objectively ascertainable.

This, therefore, is the purpose of this study. Its aim is to provide a better understanding of the rationale underlying the rule of *pretium certum*. Thereafter one is better placed to evaluate its practical application to contracts of sale. In particular, this study will ask two questions, viz.

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96 Lotz *Purchase* 367.

- *when* price will be regarded as certain or objectively ascertainable, and
- *why* price, if not immediately certain, must be objectively ascertainable.

As our courts' approach to *pretium certum* has been essentially casuistic, these questions will likewise be answered primarily by an examination of the case law. This examination will reveal the specific factual instances in which our courts have regarded the price set by the parties as not being certain or objectively ascertainable. At the same time, it is hoped that the reasons why price must, if not certain, be objectively ascertainable, will become apparent from a reading of these judgements. As this rationale becomes clearer, it is envisaged that one will ultimately be better placed to evaluate specific instances in which the certainty of price is questioned, and to suggest the approach to be taken in the application of the rule in the future. The first step, therefore, is to set out in detail the many examples in our case law in which the certainty - or ascertainability - of price has been questioned. This, accordingly, is done in Chapter 2.

CHAPTER TWO: THE APPROACH BY SOUTH AFRICAN COURTS TO THE ASCERTAINMENT OF PRICE

2 1 Introduction

In *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* Corbett JA held that parties may agree upon a price

> by fixing the amount of the price in their contract or they may agree upon some external standard by the application whereof it will be possible to determine the price without further reference to them.[97]

Price, accordingly, must either be certain, or it must ascertainable by reference to an external standard and, in an evidently related manner, it should follow without further recourse to the parties themselves. At **1 2 3** it was stated that the fact that a price may be set with certainty from outset gives rise to few problems. Clearly this is so when two parties agree immediately on a fixed amount which is then to be paid by the purchaser; no doubt exists as to what is required from the latter. In this chapter, however, the focus is on the more problematic alternative, that is, when the parties agree to make their price not immediately certain but rather merely ascertainable. In particular, the implications of what it means to require the specifically *objective* ascertainment of price will be considered, with particular reference to the approach of our courts.

2 2 The objective ascertainment of price

2 2 1 The requirement of objectivity

It should be apparent already that if the parties choose not to make price immediately certain, but prefer to provide for a price that is merely ascertainable, the law does not allow them *carte blanche* as to *how* price may be later ascertainable. Rather, before the law recognises this price, it must be not be in any manner ascertainable but *objectively* ascertainable. This can be seen in the views of modern commentators and our courts who, while not consistent in the expression of this requirement, require it, nonetheless, in substance; this can be shown below.

In expressing the requirement that ascertainment must be objective, it is most usually said that reference must be made to an 'external standard'.[98] Lotz, however, specifically refers to an 'objective standard',[99] and it has also been said that the price must be ascertainable by

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97 1986 2 SA 555 (A) 574C.

98 See typically *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* 1964 1 SA 669 (W) 670, which has been subsequently followed in numerous other cases, such as *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 2 SA 555 (A) 574, and *Shell SA (Pty) Ltd v Corbitt and Another* 1986 4 SA 523 (C) 526.

99 Lotz *Purchase* 367. See also the recent cases of *Stead v Conradie en Andere* 1995 2 SA 111 (A)

reference to existing fact or facts.[100] Likewise, it is said frequently that price should be ascertainable without further recourse to the parties.[101] While this is often stated together with the requirement that reference should be made to an external standard, Kerr simply states that a price should be certain or ascertainable without further reference to the parties.[102] A writer such as Hawthorne, on the other hand, indicates that the requirement that no further recourse should be made to the parties is, if not wholly independent of the clear requirement that reference is to be had to an external standard, by itself an important consideration. After observing that the parties may identify an external standard by which performance may be determined, the former states that it is important that there should be no need for the parties to be consulted in order to ascertain their intention in regard to the proposed performance.[103] Similarly, Lubbe & Murray remark as follows:

> When an external standard is established, the maxim 'id certum est quod certum reddi potest' (that is certain which can be made certain) is applicable and it is therefore essential that there be no further need to consult parties to clarify their intention.[104]

It appears, therefore, that by objective ascertainment it is meant that the ascertainment process should not require the further input of the parties; price should be determinable simply by reference to some external standard. Perhaps here one states the obvious. Nonetheless, while general agreement on this requirement seems clear, such unanimity does not tell us why precisely ascertainment should be objective; that is, why no further recourse should be necessary in order for a price to be deemed adequately ascertainable in the eyes of the law. This is examined below.

2 2 2 Objective ascertainment: removing price beyond the clash of wills

The reason why price should specifically be *objectively* ascertainable is, in fact, at first glance relatively straightforward. While the answer would not appear to have been given expressly in any case dealing specifically with the issue of price, it has already been indicated by the application of the maxim *id certum est quod certum reddi potest* within the context of the identification of the *merx* in contracts concerning the sale of land. In *Odendaalsrust Municipality v New Nigel Estate Gold Mining Co Ltd* Van den Heever J observed with regard to the *essentialia* of a contract for the sale of land, that the 'contract in itself must place the subject-matter of the transaction, the price and the fact of consensus out of range of the clash

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123C, and *Boland Bank Bpk v Steele* 1994 1 SA 259 (T) 275C, where the element of *objectivity* is expressly mentioned.

100 Lee & Honeré *Obligations* 75. See also the sets of external facts to which reference may be made in O'Donovan *Mackeurtan's Sale* 45; Hackwill *Mackeurtan's Sale* 15; and Mostert et al *Koopkontrak* 10-11.

101 E.g. *Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd*, above, at 574; *Genac Properties Jhb (Pty) Ltd v NBC Administrators CC* 1992 1 SA 566 (A) 577; *Stead v Conradie en Andere*, above, at 123; *Burroughs Machines Ltd v Chenille Corporation of S.A (Pty) Ltd*, above, at 670; *Shell SA (Pty) Ltd v Corbitt and Another*, above, at 526.

102 *Sale* 33.

103 Hawthorne 1992 *THRHR* 640.

104 *Contract* 314.

of will of the parties'.[105] Strictly speaking Van den Heever J was in this instance referring to a *written* contract, as required by statute for the sale of land. Important, however, is that the *agreement* between the parties must place price beyond the reach of consensus, irrespective whether this agreement must be in written form (as in *Odendaalsrust Municipality*) or is one to which no such formalities attach.

This applies to price in all contracts of sale, and, pointedly, Van den Heever J himself notes, following his remarks above, that, consequently, the law does not prevent one from buying at a price to be fixed by a third determinate person.[106] Accordingly, whether one elects to set a certain price immediately, or whether one prefers (e.g. by appointing such a third determinate person) to provide for the later ascertainment of price by the application of *id certum est quod certum reddi potest*, the matter must be placed beyond the reach of consensus. In other words, no further agreement between the parties should be necessary before a final price is indeed quantified. For if further agreement is indeed required, the matter is placed once more within range of the clash of will of the parties. The parties may never agree on a price and the final quantification of price may never occur. In such a case, there is uncertainty as to *whether* a price will in fact be set. Accordingly a key requirement of external or objective standards or mechanisms created by the parties to effect a final ascertainment of price would appear that they should be able to effect such ascertainment without requiring the further agreement of parties.

At this early stage in this study, the explanation that by requiring an objective ascertainment of price, the law wishes to place price beyond the reach of consensus, shall be regarded as adequate. There may well be, of course, other reasons which require an objective ascertainment, but which, at this stage, may not be as apparent. These will hopefully materialise during the course of the discussion. The rest of this chapter, however, will comprise an examination of the courts' approach to ascertainment, and the strictness with which the objectiveness of an ascertainment is judged. Accordingly, this chapter focuses on (i) price ascertainment by reference to external facts, (ii) price ascertainment by calculation, (iii) the ascertainment of price by third parties, and (iv) the possibility of ascertainment by either the purchaser of seller, or both parties together. Thereafter, an attempt is made at a categorisation of the various situations under which a price will fail for reason of not being either certain or objectively ascertainable. In this synopsis, the reasons for that particular failure will be given, and it will then be shown whether this failure can be said to properly relate to the requirement of certainty, or whether some other consideration forms its basis.

2 3 Reference to external facts

2 3 1 General

A common method whereby parties attempt to make price ascertainable is to include a contractual term wherein it is provided that the price can be ascertained by reference to an external objective standard. Although the distinction is not overly significant, one may for the

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105 1948 2 SA 656 (O) 665. See also e.g. *Grobler v Naude* 1980 3 SA 320 (T) 329-330; *Clements v Simpson* 1971 3 SA 1 (A) 7-8.
106 Ibid.

sake of clarity distinguish these cases from ascertainment mechanisms which involve formulae in the narrow sense of the word, that is, where the price is determined not by reference but by calculation.[107]

Examples of the former are accordingly where reference is made in a contract to an advertisement containing the sale price published in a magazine.[108] Likewise price may be suitably ascertained when the parties are referred to a document constituting the current price list of a certain product.[109] As common is reference, not to a specific document, but to a specific objective standard. This may be done where the parties, for example, agree specifically on the usual price, the market price or on even the current value.[110] Such agreement may be express or tacit.

In all these cases, whether reference to such an objective standard constitutes sufficient setting of the price will depend upon whether evidence can be adduced to quantify the price in terms of the objective standard.[111] Thus it has been stated[112] that a formula or reference to an objective standard may succeed in some circumstances, but fail in others: success or failure will depend upon whether adequate evidence can be adduced to quantify the price.

Thus in *Engelbrecht v Nel* a fixed price had been set in a deed of offer of purchase for certain immovable property.[113] In addition to a price, the deed indicated amounts to be paid in instalments each month, as well as a percentage interest to be paid on the 'reducing balance per month'. A certain amount which was to be an instalment figure had been deleted and no new amount had been inserted, and the figure given for interest had likewise been deleted and replaced by the phrase 'bank overdraft rate'. The court held firstly that mode of payment was a material term of the agreement and could not be agreed upon later; consequently as there appeared to be no agreement on the amount to be paid by way of instalment each month, the contract was void for uncertainty. More germane to the issue of the setting of price (or at least, prestation), however, was that the court in addition found that the new reference to 'bank overdraft rate' failed likewise for uncertainty, in that evidence would be necessary to establish what was meant by this phrase. This the court said, 'would amount to a modification or supplementing of a material term of the agreement in order to render in enforceable and hence be inadmissible'.[114] This approach, however, has been criticised as being too strict.[115] As in the case of all contracts, the requirement of certainty will be met when the agreement renders its consequences objectively certain, and on the admittance of extrinsic evidence, the particular bank overdraft rate could presumably have been ascertained.[116]

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107 See 2 4 below.
108 *Coronel v Kaufman* 1920 TPD 207.
109 *Shell SA (Pty) Ltd v Corbitt and Another* 1986 4 SA 523 (C).
110 For example, *R v Levitas* 1946 TPD 631; *R v Deetlefs* 1948 4 SA 791 (T) (both usual price); *Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk* 1993 1 SA 768 (A); *Steyn NO v Lomlin (Edms) Bpk* 1980 1 SA 167 (D) (both market price); *Stead v Conradie* 1995 2 SA 111 (A) ('huidige waarde').
111 Van der Merwe et al *Contract* 163.
112 Kerr *Sale* 34; Joubert *General Principles* 179.
113 1991 2 SA 549 (W).
114 553B.
115 Lubbe 1991 *AS* 80.
116 See e.g. *Pattison and Another v Fell and Another* 1963 3 SA 277 (D); *Clements v Simpson* 1971 3 SA 1 (A).

Likewise, in the old Transvaal case of *Douglas v Baynes*, a decision of the Privy Council, a farm was sold for a purchase price which was to consist of a certain number of shares in a syndicate which was still to be formed.[117] The syndicate was subsequently formed, but the Council nonetheless held that the price was insufficiently certain in that it consisted of shares in a syndicate the nature of whose objects, the extent and the character of whose operations and the adequacy of whose working capital was not ascertainable with precision.[118]

On the other hand, in *Stead v Conradie* the court regarded a reference to 'huidige waarde' as entailing 'markwaarde', which, it stated, was objectively ascertainable.[119] Likewise in *Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk* the court held that 'markverwante pryse', like 'markprys', although not precisely defined, constituted an acceptably sufficient reference.[120]

Relating price to market or usual standards, however, may at times be difficult to attain in practice. Kerr, for instance, cites the example of the sale at the usual price of an old Master painting which had been in a person's estate for 50 years, or of a rare postage stamp which had not been on the market for 30 years. Prices paid decades ago will not be sufficient evidence of what could be obtained at present. Reference, therefore, to a 'usual price', which is a common enough and generally successful reference, could under these circumstances fail.[121]

A similar problem appears in *Steyn NO v Lomlin (Edms) Bpk.*[122] In this case, a vehicle was sold to the respondent for R45 000 subject to the provision that '[d]ie koper [respondent] onderneem om aan die verkoper sand te lewer teen heersende markpryse totdat die volle koopsom van R45 000 vereffen is'. It was shown, however, that no 'objektiewe maatstaf soos 'n heersende markprys' existed and that the price of sand was probably intended to be determined by the later agreement of the parties.[123] Although the court noted that a price of R45 000 have been fixed, the court clearly regarded the price of sand has crucial in determining the price of the vehicle - that is, in determining the 'omvang van respondent se teenprestasie'.[124] Consequently the court referred to *inter alia Margate Estates Ltd v Moore* and *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* in support of the conclusion that no contract had been concluded.[125] The case is therefore a good example of

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117 1907 TS 508, 1908 TS 1207.

118 1213. As to the impression created by this case and *Steyn NO v Lomlin (Edms) Bpk* (see the text below) of exchange and not sale, see e.g. Hackwill *Mackeurtan's Sale* 19 who states that a contract of sale does not cease to be a sale where the parties merely fix a method of payment of the purchase price, for example, by the delivery of shares or other property at a fixed value in part payment.

119 1995 2 SA 111 (A) 123B-C.

120 1993 1 SA 768 (A) 775A-H. At 775C the court reaffirmed the above test in stating that 'solank die werking daarvan bepaalbaar is, is daar nie sprake van vaagheid wat aanleiding gee tot nietigheid nie'. The case itself concerns rental, but 'markverwante pryse' specifically related to certain timber, the value of which would aid in determining rental.

121 Kerr *Sale* 34 n 51. See also *Steyn NO v Lomlin (Edms) Bpk*, below, where it was found that the *merx* in question (sand from a particular quarry) did not have a 'gangbare prys'.

122 1980 1 SA 167 (D).

123 170B-E.

124 170G.

125 1943 TPD 54 and 1986 2 SA 555 (A) respectively.

the failure of a reference to an objective standard, namely, 'heersende markprys'.

In *Rustenberg Platinum Mines Ltd v Breedt*, on the other hand, the respondent ceded mineral rights to the appellant for the price of R150 per morgen.[126] It was provided, however, that in the event of the appellant at some later stage paying a higher price for similar rights in the same district to any other owner, the respondent would be immediately entitled to the higher price. In separate judgements, both Van Heerden JA and Harms JA observed that the intentions of the parties had been to ensure that cession took place at market price, and in the absence of suitable or comparable transactions, had created the above computation machinery. Later cessions of mineral rights in the district were thus regarded as indicative of market price, and the parties had accordingly provided that the original price should, if necessary, be adjusted so as to equal any subsequent price obtained. Both judges regarded the clause as being operational for a limited period, viz. a reasonable time, and Van Heerden JA noted that the respondent could not raise market relatedness after a lapse of many years. The effect of the judgements, therefore, was that the clause was applicable to consecutive cessions made within a reasonable period after the original sale, or, in other words, until a *market* could be said to have been established in the area with respect to those mineral rights. The case is an interesting one in that it indicates that parties place great stock in the market price, presumably as this is, at the least, a satisfactory price for two parties who are both uncertain as to for what price they should bargain without the risk of undercutting themselves. If the sale is for the market price, both parties would theoretically be in a position to return to the previous *status quo* either by selling the *merx* to another (and expect to obtain the market price) or buying similar items from other sellers in the market (and again, expect to pay the market price). It is also an useful example of a mechanism employed by parties to allow for consequent adjustment of the price, while, nonetheless, providing for a fixed price from outset.

An aspect, however, that has created some confusion and where the law would appear somewhat at odds, is recognition of a *tacit* term referring to an objective standard.[127] Thus in *Erasmus v Arcade Electric* it was said that where a person buys something from a trader without a price being expressly fixed, then a tacit ('stilswyende') price will be held to be implied, and that this would be the price normally charged by the trader for that article, or the price the trader himself paid for it, or failing that, the ruling market price.[128] In both *R v Soller* and *R v Pearson*[129] the court also found for an 'implied' price, namely, the usual price ordinarily charged, or, if that dealer did not have a usual price for that item of goods, the current market price of that article.[130]

What appears here to be dissatisfactory is the courts' tendency to express the possible results

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126 1997 2 SA 337 (A).

127 See e.g. O'Donovan *Mackeurtan's Sale* who at 46 recognises this confusion, though, with respect, possibly casts little light himself, and also Coaker & Zeffertt *Mercantile Law* 88-9 for the 'difficulties' apparently encountered in these situations and their rather haphazard approach to this problem.

128 1962 3 SA 418 (T) 420. This was confirmed *obiter* in *Lombard v Pongola Sugar Milling Co Ltd* 1963 4 SA 119 (D) at 128D as 'a correct statement of the law on sale'.

129 1945 TPD 75 and 1942 EDL 117 respectively.

130 See Belcher *Norman's Purchase* 46 and earlier editions of this work.

of a tacit term with respect to price as a list of consecutive alternatives, with each alternative to be slotted into its appropriate circumstance in the event of the previous alternative being inappropriate. Thus *Erasmus v Arcade Electric*, and especially perhaps *Lombard v Pongola Sugar Milling Co Ltd*,[131] both give the impression, for example, that when goods are bought from a trader, and there is no express agreement on the price, one is inevitably obliged to first find for the trader's normal or usual price, and failing this (when, for example, the trader has no normal price for the article as he seldom keeps it in stock), the price that the trader paid for it, and should this also for some reason fail, then finally the ruling market price. The impression is then created that where no price is expressly agreed upon and the sale involves a trader, the law provides *ex lege* for an 'implied' price appropriate to those particular circumstances. This suggests that price is in these circumstances is determined by operation of law, an inaccuracy aggravated by the use of the term 'implied'.[132]

In as much as Kerr and O'Donovon[133] argue that in cases where no price has been expressly set, no such residual provision exists as to a reasonable price, it can to a similar extent not be said that such an *ex lege* provision exists as to a usual price, or the current market price. In the absence of express agreement, a price may well be found to be the usual price, or the price charged others, or the market price, but then this must specifically be found to be a tacit term. The impression created, even if unintentional, that such prices are implied by law, is misleading.[134] The general principles relating to the determination of tacit terms are as applicable here as elsewhere.[135]

Finally, it is suggested that the thoroughly pragmatic approach of De Villiers AJ in *Lobo*

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131 Above, at 420A-B and 128B-D respectively. In addition to the *Pearson* and *Soller* cases above, *Machanick v Simon* 1920 CPD 333 at 338 also appears to suggest this approach. With respect to the situation where a person buys an everyday article from a shop without asking the price, the court held that 'in our modern law it will be held that there was an implied agreement to pay at least a reasonable sum, if not the selling price of such articles in that shop'. For a similar approach see also Belcher *Norman's Purchase* 46 as well as O'Donovan *Mackeurtan's Sale* 46.

132 Case law (and especially older case law) frequently refers to 'implied' terms without indicating whether by this it is meant terms agreed to tacitly by the parties themselves, or terms implied by the law as a matter of course (i.e. *naturalia* or *ex lege* terms, or what Kerr *Contract* 283 refers to as residual provisions). See here also Van der Merwe et al *Contract* 197. For the distinction between the two, and on the practice of failing to make this distinction, see *Minister van Landbou - Tegniese Dienste v Scholtz* 1971 3 SA 188 (A) 197, and especially the passage cited from Salmond & Williams.

133 Kerr *Sale* 30, and O'Donovan *Mackeurtan's Sale* 46.

134 Van Jaarsveld *Handelsreg* 300 notes too that where no price is expressly agreed upon, for example, where buying everyday articles such as bread or milk, it is accepted that the parties can tacitly agree upon 'die gangbare, gebruiklike of geldende prys'. However while recognising that one is concerned with tacit agreements, Van Jaarsveld also inadvertently misrepresents the correct situation. At 300, it is stated that '[b]estaan daar geen geldende prys nie, of kan die gangbare prys nie vasgestel word nie, is daar nie `n geldige koopkontrak'. Strictly speaking, this is not entirely true as the parties could have tacitly agreed upon some *other* objective standard, thereby providing for a price, and accordingly a valid contract of sale. Nonetheless it is agreed that most tacit terms regarding price will constitute references to, for instance, the usual, current or market price.

135 See the leading cases of *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 3 SA 506 (A); *Techni-Pak Sales (Pty) Ltd v Hall* 1968 3 SA 231 (W); *Wilkins NO v Voges* 1994 3 SA 130 (A). Also Van der Merwe et al *Contract* 197; Wessels *Contract* § 261.

Properties (Pty) Ltd v Express Lift Co (SA) (Pty) Ltd be taken into account whenever no price is specifically agreed upon between the parties.[136] While made primarily within the context of lease, and the situation pertaining where there is consensus between lessor and lessee to let property but 'at a rental mutually contemplated but not expressed', De Villiers AJ makes clear his views are applicable to similar situations such as price in sale,[137] and thus states as follows:

> The true answer probably lies in an avoidance of dogmatism: the *particular circumstances* of a specific case could result in a conclusion of no contract, or of an intent on the part of the parties to be bound by a specific criterion such as a ruling or customary price, rent or remuneration, or of an intent to be subject more generally to *arbitrium boni viri* as to what is fair and reasonable. Where the mutual intent to contract is clear, and in the absence of circumstances justifying an inference of a *de facto* intent to be bound by some specific criterion, our courts appear to favour an implied intent to be bound to what is fair and reasonable. (my emphasis)[138]

It is clear, therefore, that each case is to be taken on its own merits. It should also be noted, of course, that silence as to price does not necessarily indicate that the parties have tacitly agreed upon, of instance, the market price. It may well simply be an indication that the parties have not reached consensus upon this issue at all, and that accordingly there is not yet a contract. The *dictum* above is also authority, although *obiter*, for the proposition that parties to a sale may agree upon a reasonable price. This proposition is dealt with immediately below.

2 3 2 Agreement on a reasonable price

The question as to whether parties may agree, whether tacitly or expressly, on a reasonable price has been dogged by controversy. Apart from it not being recognised in Roman and possibly Roman-Dutch law, it would appear that there does exist some support in case law for the view that sale for a reasonable price is not recognised in our law, although this is regarded by Zeffert as sparse.[139] In *Erasmus v Arcade Electric*, for instance, the court *a quo* appeared to have found that the parties tacitly agreed on a 'redelike prys'.[140] The court on appeal appears to assume the correctness of this finding as it thereafter states that '[s]elfs al kan die nodige konsensus afgelei word ... skep die vraag van *pretium* `n groot struikelblok ...'.[141] The court thus implies that the 'struikelblok' is not whether the parties (tacitly) agreed on a 'redelike prys' but whether the latter is enforceable in our law.[142]

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136 1961 1 SA 704 (C).

137 See here 708D, as well as the citation in the text below.

138 708G-H. By implied intent, one presumes that De Villiers AJ means that, *in such circumstances*, the courts are likely to find for a *tacit* agreement to be bound to what is fair and reasonable.

139 Zeffertt 1973 *SALJ* 114. For an examination of the position in Roman and Roman-Dutch law see Zimmermann *Obligations* 255, and Lotz *Purchase* 368 and the sources referred to by these writers. See also *Adcorp Spares P.E. (Pty) Ltd v Hydromulch* 1972 3 SA 663 (T) for a treatment of our common law authorities.

140 1962 3 SA 418 (T) 419G.

141 419H.

142 See, however, O'Donovan *Mackeurtan's Sale* 47, and De Wet & Yeats *Kontraktereg* 218 n (f) who doubt whether the case was at all concerned with sale at a reasonable price and therefore applicable. For other possible authority in favour of the non-recognition of sale at a reasonable price

The chief objection to the recognition of sale at a reasonable price, however, would seem to be the fear that no content can be ascribed to it. Thus in *Adcorp Spares P.E. (Pty) Ltd v Hydromulch* the court contrasted a usual price with a reasonable one, and submitted that as to the former, it referred to a factual position which could be proved, in contrast to a fair and reasonable price which was dependent on opinion.[143] Likewise, in *Lombard v Pongola Sugar Milling Co Ltd* the court spoke of the 'serious difficulties' it might encounter in determining reasonable remuneration or reasonable price.[144]

This, however, has been disputed.

On the one hand, it has been suggested that although one may not have a 'sale' at a reasonable price, such an agreement will be enforceable as an innominate contract. Thus the court in *Adcorp Spares P.E. (Pty) Ltd v Hydromulch* stated the following:

> Such an agreement to deliver against payment of a fair and reasonable amount of money would in my view, be actionable as an innominate contract. Such a contract will have its own elements of risk and obligations as to delivery which would not necessarily coincide with such elements in a contract of sale. [145]

The logic in this recognition is presumably that the common law authority prohibiting the acceptance of a reasonable price pertained only to the specific Roman contract of sale: the terms of an innominate contract do not fall within the scope of the prohibition. Consequently both Lee and O'Donovan opine such agreements to be enforceable as innominate contracts, as '[t]here is no reason why they should not, as an action lay under the Roman law'.[146]

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see *Adcorp Spares P.E. (Pty) Ltd v Hydromulch*, above; *Trook t/a Trook's Tea Room v Shaik* 1983 3 SA 935 (N); *Lombard v Pongola Sugar Milling Co Ltd* 1963 4 SA 119 (D); and *Hattingh v Van Rensburg* 1964 1 SA 578 (T) 583. For the views of writers who submit there to be no authority for the recognition of sale at a reasonable price see *inter alia* Mostert et al *Koopkontrak* 11; Van Jaarsveld *Handelsreg* 299 n 134; Belcher *Norman's Purchase* 67. For writers taking the contrary view, see the writers referred to in the notes below, as well as Erasmus, Van Warmelo & Zeffertt 1975 *SALJ* 267. For an exposition of authorities in general see also Van der Merwe et al *Contract* 163 n 19 and Lubbe & Murray *Contract* 315.

143 Above, at 668F-H.

144 Above, at 128F.

145 Above, at 668H.

146 Lee *Introduction* 292 and O'Donovan *Mackeurtan's Sale* 47 respectively (citation from the latter). Also Hunt 1962 *AS* 100. Mostert et al *Koopkontrak* 11 n 7 nonetheless criticise O'Donovan's approach in that 'dit sê nog nie vir ons hoe daar tot bepaling van die prys gekom sal word nie en is daarom betekenisloos'. See also O'Donovan, ibid., at 47 whose n 30 (which suggests that the ascertainment of a 'reasonable price' as a term in an innominate contract would cause no problem for the courts as it is a reference to an objective standard) applies equally to the ascertainment of a reasonable price as a term of a contract of sale, and not merely as a term of an innominate contract. The latter writer, however, prefers to maintain the distinction between the two types of contracts as a ground justifying the non-recognition of reasonable price in sale. Nonetheless Mostert, Joubert & Viljoen's note above (*Koopkontrak* 11 n 7), although dismissive of any suggestion that a reasonable price may in fact be ascertainable, indicates, correctly it is submitted, the fallacy in distinguishing reasonable price in the context of a contract of sale as opposed to within the context of an innominate contract.

Why, however, this distinction should be made with respect to enforceability is not clear. The distinction between an innominate contract and a contract of sale may be relevant with respect to various *consequences* of the contract, for example, the passing of ownership and provisions concerning risk, which may or may not coincide. Logically, however, the enforceability of a term of a contract should not be affected by the label we attach to that contract. As Hunt has stated, it should not matter whether the contract is called a sale or an innominate contract, as the fundamental question is rather whether the parties have arrived at sufficiently certain terms.[147] This is surely borne out by the facts in the *Adcorp* case.[148] Why should the court in this case on the one hand find an agreement to pay a reasonable price to be too uncertain to give rise to a valid contract of sale, yet find it actionable as an innominate contract? Why do the numerous difficulties encountered with respect to reasonable price as a term of a contract of sale, suddenly not apply to innominate contracts? This denies common sense.

On the other hand, it has been stated that irrespective of the label we attach to the contract, the *crux* of the question regarding reasonable price remains that of certainty:

> [for] that which can be reduced to certainty is certain and an agreement to pay a reasonable price may be capable of being reduced to certainty if the court is able to determine what is reasonable *in the circumstances of a particular agreement.* (my emphasis)[149]

This view would then regard the problem of a reasonable price as no different from any other arising as result of the parties referring to some external standard. The sufficiency of any external standard by which price must be ascertained is whether sufficient evidence can be adduced to quantify the price due in terms of that standard.[150] Thus in this context, the question in every case is whether evidence is available to place some monetary amount upon what constitutes a reasonable price in the particular circumstances of that case.[151]

In principle, this approach cannot be faulted. Reasonableness is an external, objective standard. Why therefore should the test regarding its application be any different to any other

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147 Hunt 1962 *AS* 101, with whom Davids 1965 *SALJ* 112-113 agrees.

148 Above, at 668F-H.

149 Zeffertt 1973 *SALJ* 113. Also Hunt 1962 *AS* 101 who states that it cannot be said '*a priori* without reference to the particular terms of and circumstances of a transaction that there can be no contract where it is agreed to sell for a 'reasonable' price ... [t]he terms may nevertheless be sufficiently certain'. Also Kerr *Sale* 35, 239. Kerr and De Villiers AJ in *Lobo Properties (Pty) Ltd v Express Lift Co (SA) Pty Ltd* 1961 1 SA 704 (C) emphasise, furthermore, that the particular intentions of the parties must be recognised: it may thus be so that despite having expressly agreed upon a reasonable price, the parties intend the usual or market price, which although frequently reflective of a reasonable price, need not constitute the same. See the citation from *Lobo Properties* at 2 3 1 above.

150 See the discussion again at 2 3 1 above and in particular Van der Merwe et al *Contract* 163 n 19.

151 See here *De Franca v Exhaust Pro CC (De Franca intervening)* 1997 3 SA 878 (SE), where an application was brought that an order be granted for the purchase of an interest in a close corporation 'at a fair price'. This was regarded as uncertain not, it seems, because of any vagueness that inherently attaches to a 'fair price', but simply because there was no suggestion whatsoever in the application's papers what would constitute the latter. The court seems to suggest that it could grant an order on the basis of a fair price, but then evidence should be adduced so as to make the latter determinable.

external standard? Recognition that parties may *in principle* agree upon a reasonable price does not inevitably lead to the conclusion that every such agreement is enforceable. The recognition of the *possibility* of a valid reference to a reasonable price is one thing; whether such a reference is indeed enforceable is another. As in the case of any other external standard, the latter is entirely a question of fact. This is a crucial distinction. There is, however, in any case, considerable support for the view that it is possible for a reference to a reasonable price to be, to a similar extent to other external standards, reduced to sufficient certainty.

Accordingly, it has frequently been said that the concepts of 'fair' and 'reasonable' are well established concepts in our law and capable of determination.[152] Thus Wessels regards a reasonable price as sufficiently ascertainable to constitute a contract of sale.[153] An appropriately accommodating approach with respect to such ascertainment has, moreover, been demonstrated before by our courts. In *Fluxman v Brittain*, for instance, the court had to determine what a 'moderate' amount entailed, and held that although it might not be easy to determine what constituted a moderate amount at that particular time, such a determination was nonetheless possible.[154] It has likewise been noted that despite the *obiter* rejection by the court in *Lombard v Pongola Sugar Milling Co Ltd*[155] of sale at a reasonable price, ostensibly because of the difficulties it creates in ascertainment, it nonetheless devoted several pages in its judgement in determining what in fact a reasonable price would constitute in the circumstances.[156]

Agreement on 'reasonable' remuneration is, moreover, well recognised in contracts of service,[157] and the general consensus today would appear in favour of the recognition of lease at a reasonable rental.[158] The Rhodesian Appellate Division tends also toward the recognition

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[152] See e.g. Cooper *Landlord* 56, who states this specifically with respect to price and sale (and not rental and lease). Also O'Donovan *Mackeurtan's Sale* at 47 n 30, who states similarly that the ascertainment of a 'reasonable price' (although meant here as a term within an innominate contract) involves a reference to objective and external standards, and creates no problems with which the South African courts are not familiar in many other contexts. For cases where the courts have had to place a value on 'reasonable', see the cases cited by Cooper, ibid., at 56 n 99.

[153] *Contract* § 287.

[154] 1941 AD 273.

[155] 1963 4 SA 119 (D).

[156] Beck 1985 *SALJ* 671 n 88, who consequently concludes that a reasonable price is clearly something capable of calculation.

[157] See *Elite Electrical Contractors v The Covered Wagon Restaurant* 1973 1 SA 195 (RA); *Inkin v Borehole Drillers* 1949 2 SA 366 (A); *Middleton v Carr* 1949 2 SA 374 (A); *Angath v Muckunlal's Estate* 1954 4 SA 283 (N); *Chamotte (Pty) Ltd v Carl Coetzee (Pty) Ltd* 1973 1 SA 644 (A); *Genac Properties Jhb (Pty) Ltd v NBC Administrators CC* 1992 1 SA 566 (A). Zeffertt 1973 *SALJ* 116-117 and Brassey 1992 *AS* 111 nonetheless warn that the analogy between reasonable price and remuneration cannot be taken too far. Also Beck 1985 *SALJ* 672.

[158] *Lobo Properties v Express Lift Co* 1961 1 SA 704 (C) especially at 708-9; also, less directly, *Proud Investments (Pty) Ltd v Lanchem International (Pty) Ltd* 1991 3 SA 738 (A) and *Genac Properties Jhb (Pty) Ltd v NBC Administrators CC*, above. Also Cooper *Landlord* 56-57; Kerr *Sale* 239; Zeffertt 1973 *SALJ* 115; Beck 1985 *SALJ* 671. Cf. *Trook t/a Trook's Tea Room v Shaik* 1983 3 SA 935 (N), followed in *Amavuba (Pty) Ltd v Pro Nobis Landgoed (Edms) Bpk* 1984 3 SA 760 (N). Beck (ibid., at 671-2) regards the *Trook* case as disturbing but dismisses it as a poor and unreasoned decision.

of sale for a reasonable price,[159] as do other decisions of the South African courts.[160] Sale at a reasonable price has, furthermore, been long accepted in overseas jurisdictions. Thus in s. 8(2) of the English Sale of Goods Act 1979 it is provided that where a price is not determined by, for instance, the method agreed upon by the parties in their contract, or if price is not mentioned at all,[161] the buyer is then obliged to pay a reasonable price. Section 8(3) thereafter specifically provides that the question as to what constitutes a reasonable price is a question of fact dependent on the circumstances of each particular case. Sale at a reasonable price is similarly provided for in § 2-305 (1) of the American Uniform Commercial Code. As a number of commentators have inevitably remarked,[162] it would be incongruous should a reasonable price be regarded as sufficiently certain to be enforceable in the United States and England yet not so in South Africa.

It would seem, in any event, that one is nearing the final word on the subject.[163] In an *obiter dictum* in *Genac Properties Jhb (Pty) Ltd v NBC Administrators CC (previously NBC Administrators (Pty) Ltd)*,[164] Nicholas AJA, with whom the other members of the court concurred, stated the following:

> It is difficult to see on what principle a sale for reasonable price, or a lease for a reasonable rent, should be regarded as invalid.

This dictum, although only *obiter*, should nevertheless be of persuasive authority. It should pave the way for the acceptance of reasonable price in the South African law of contract. The significance of this step should not be underrated. Its importance is not merely restricted to its inevitable influence on situations where parties do in fact agree on a reasonable price. For if it

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159 *Elite Electrical Contractors v The Covered Wagon Restaurant* 1973 1 SA 195 (RA) where the court rejected the contention that cases such *Erasmus* and *Adcorp* (see above) established that it was a *general* rule of contract that one could not agree on some form of reasonable charge or remuneration, as such a reference lacked sufficient certainty. While intentionally not expressing itself on this issue within the context of reasonable price in sale, the court clearly indicated that in the *general* rules of contract nothing could be said against it, and seemed therefore to favour its acceptance. Zeffertt 1973 *SALJ* 116 applauds this decision as one 'obviously correct in common sense'. See also *Cone Textiles (Pvt) Ltd v Tribal Trust Land Development Corporation Ltd* 1979 2 SA 1051 (RA) which concerned reasonableness in the context of rates and charges.

160 See e.g. *Machanick v Simon* 1920 CPD 333 as well as, importantly, *Lobo Properties (Pty) Ltd* v *Express Lift Co (SA) Pty) Ltd* 1961 1 SA 704 (C). The latter case, while dealing essentially with lease, specifically suggests that the position with regard to (reasonable) rental may be extended to similar situations such as price in sale. See the citation from this case at 2 3 1 above.

161 See here s. 8(1) for the manner in which a price may be fixed in a contract of sale.

162 E.g. Zeffertt 1973 *SALJ* 117; Davids 1965 *SALJ* 113. Davids does, however, following reference to English law and the position in the United States of America, cite *Corbin on Contract* who mentions some of the disadvantages encountered in the acceptance of this standard, including that '[i]t cannot properly be assumed the only one price or wage is reasonable under the particular circumstances of any case' (113). Davids, however, does not regard these disadvantages as any greater those encountered in, for example, the determining of what constitutes a usual price. See also *Genac Properties Jhb (Pty) Ltd v NBC Administrators CC* 1992 1 SA 566 (A) 577G-578D.

163 See here the remarks of Brassey 1991 *AS* 93 and 1992 *AS* 110 (albeit with respect to reasonable rent).

164 Above, at 577G-578D. Nicholas AJA cited various authorities in support of this contention. See also Kerr *Sale* 35; Lotz *Purchase* 368.

can be shown that the concept of reasonableness is not so uncertain so as to be unacceptable within this context, then the objection must be less to its use within other contexts in the law of sale. This will be referred to again later.

2 4 Formulae requiring calculation

The second broad category which one may for the sake of clarity distinguish, is that incorporating mechanisms whereby some calculation is required in order to fix the price. As has been stated, any mechanism or method may in general be used to bring about calculation provided that it is successful in this task.[165] Mechanisms that have been used vary greatly in our case law, and the following examples may serve to illustrate this diversity.

(i) In *Bouwer v Adelford Motors (Pty) Ltd*, the buyer, a car dealer, agreed to pay the seller of a car a certain amount plus whatever further amount he himself could get on resale of the vehicle, up to a certain amount set as ceiling.[166] The court regarded this as an acceptable price. Similarly, in *Transvaal Provincial Administration v Pessen*, the court encountered no problem in accepting as a valid price a provision in a cession of a lease whereby the cessionary agreed to pay to the cedent an amount equal to that which the cedent had himself expended in originally acquiring the lease, and in addition a further 20% of any net profit which the cessionary might make should he himself subsequently dispose of the lease.[167]

(ii) In *Warrenton Munisipaliteit v Coetzee*, in a public auction for the lease of certain premises, a tender was made at 'R1 more than the highest tender per hectare per year'.[168] This tender was regarded as null and void for vagueness in that it could not be said that the performance to which the tenderer committed himself was always determinable. This was not determinable, for example, where he was the only tenderer or where everyone tendered in this manner. Thus whilst strictly concerning the certainty of a term in an offer (i.e. a tender), and not agreement on price, this case nonetheless demonstrates again the test for the sufficiency of objective standards; that is, whether evidence can be adduced to quantify the price in terms of the objective standard.[169]

(iii) An early example of the successful application of a price ascertainment mechanism is that of *Hill Brothers & Co v Alexander & Jones*.[170] In an action for certain goods sold, the defence was led that as no evidence could be shown that a fixed price had been agreed upon, the court was obliged to rule that there had been no contract. Gallwey CJ, however, although agreeing that there was no fixed price, held that 'our law is not so unreasonable as to lay down

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165 Mostert et al *Koopkontrak* 10, 12.
166 1970 4 SA 286 (E).
167 1925 TPD 415. Both the *Bouwer* and *Tranvaal Provincial Administration* cases bear a striking resemble to examples cited in the *Digesta*, namely *Digesta* 18 1 7 2 and *Digesta* 19 1 13 24. Reference was consequently made in the *Tranvaal Provincial Administration* case at 422 and at 428 to these Roman precedents and authorities.
168 1998 3 SA 1103 (NC).
169 See again 2 3 1 above, and Van der Merwe et al *Contract* 163.
170 (1891) 12 NLR 202.

that the price cannot be ascertainable as the subject of an agreement between the parties.'[171] Although clearly the court had difficulty in reconstructing this 'agreement' or mechanism, it persevered, stating that it was its duty to give effect to any such agreement that could be found.[172] The mechanism *in casu* amounted to a reference to the English market rates for the goods in question, subject to fluctuations in that market, and subject in addition to the provision that irrespective of the amount of these fluctuations, they were not to exceed local prices [i.e. Newcastle, Natal] for similar goods, less 10%.

(iv) A further early example of a price ascertainment mechanism is to be found in *Colonial Government v Barkly West Bridge Company Ltd.*[173] The contract in question envisaged eventual sale by the Barkly West Bridge Company of a bridge, which it had erected and with respect to which it had toll rights, to the Colonial Government. The price envisaged was to be calculated with reference to data such as the net receipts taken by the company by toll over a certain period of time, and involved actuarial calculation.

(v) In *Standard Industries Ltd v Marwick* the plaintiff sold to the defendant five tons of fertilizer at £12 per ton under a written contract which contained a clause which read: 'In the event of price receding before delivery buyer to benefit'.[174] The plaintiff delivered the fertilizer and claimed £12 per ton as the price. The defendant, however, tendered £50, alleging that the word price meant the current market price of a similar fertilizer, and that this had since receded to a price of £10 per ton. The court, however, rejected this contention, holding that on an ordinary interpretation of the contract, the word price meant the seller's price, and not the average market price for fertilizer, and that as there had been no fall in the plaintiff's price, he was entitled to a price of £12 per ton.

The case is an interesting one in a number of respects. Firstly, it illustrates how parties may include a provision permitting adjustment of an already fixed price under certain circumstances. Why parties might agree upon such the provision for such adjustment is moreover indicated by the following remarks of Dove-Wilson JP:

> I can quite well understand a purchaser who contracts so long before delivery, stipulating that if at the time of delivery the sellers were selling their fertiliser at a lower price he was to be entitled to the benefit of it.

An adjustment clause is also encountered in *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd*,[175] although whereas the clause in *Marwick* makes provision for a decrease to the agreed upon price, the clause in *Burroughs* contemplates an upward adjustment. The *Burroughs* case has been examined in some detail in Chapter 1. It may be noted, however, that despite the adjustment clause in *Burroughs* being couched in terms substantially more detailed than those to be found in *Marwick*, the clause in the former was ruled as not providing for

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171 204.
172 Ibid.
173 (1908) 25 SC 124. This mechanism sets out, in fact, the maximum price that could be paid by the buyer (the Colonial Government) in order to compel the seller (the Company) to sell, but did not necessarily fix the final price itself; it was open for the parties to agree upon some other price.
174 (1920) 41 NLR 83.
175 1964 1 SA 669 (W).

price with sufficient certainty.

(vi) Price ascertainment mechanisms may also be found in legislation.[176]

2 5 Price determination by third parties

2 5 1 Introduction

The third category into which one may conveniently classify price ascertainment mechanisms is that entailing references to third parties. It has long been accepted that parties can agree upon a third party or parties to determine a price.[177] This follows from the general rule that agreement on price which is essential for an enforceable contract of sale is obtained not only where a certain price is immediately agreed upon but also where it made objectively ascertainable. As a general statement of the law, it is usually said further that the third party must be identified in the contract, or identifiable.[178]

The power afforded to a third party to fix a price is not necessarily unlimited. The parties in nominating the discretion holder may fix limits within which the price must fall, or may prescribe a method, conditions or guidelines which the third will be required to adhere to in the exercising of his power.[179] There is, moreover, authority that a third party discretion to set a price will in any event always be limited in that it must be exercised reasonably.[180]

It may at times be difficult to ascertain when a power to fix a price has been given to a third, and when in fact, whilst appearing to be in favour of the third, the power has actually been

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176 See e.g. *Cogen & Co (Pty) Ltd v Pretoria Produce & Milling Co Ltd* 1932 TPD 36 and the escalation clause included in the legislation under examination, namely, Act 36 of 1925. Note also that a maximum price at which goods may be sold may also be fixed by the statutory-appointed price controller in terms of the Sale and Services Matters Act 25 of 1964. See also the wartime cases of, for example, *R v Deetlefs* 1948 4 SA 791 (T); *R v Soller* 1945 TPD 75; *R v Pearson* 1942 EDL 117; *R v Kramer* 1948 3 SA 48 (N); and the War Measures Act 13 of 1940.

177 See in general Kerr *Sale* 36 and accompanying references to our old authorities. Also Wessels *Contract* 140-141, 1093-1094; Mostert et al *Koopkontrak* 12 ff; Belcher *Norman's Purchase* 65; Hackwill *Mackeurtan's Sale* 16; Van Jaarsveld *Handelsreg* 299; Hutchison *Wille's Principles* 530; Coaker & Zeffertt *Mercantile Law* 188. For case law see the numerous references below.

178 For example, Mostert et al, ibid., at 13; Kerr, ibid., at 36; Wessels, ibid., at 141; Hackwill, ibid., at 16; *Cassimjee v Cassimjee* 1947 3 SA 701 (N); *Faatz v Estate Maiwald* 1933 SWA 73, 90; *Odendaalsrust Municipality v New Nigel Estate Gold Mining Co Ltd* 1948 2 SA 656 (O) 663; *Reymond v Abdulnabi* 1985 3 SA 348 (W) 349G-350G.

179 See e.g. the limits set by the parties in *Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk* 1993 1 SA 768 (A) at 775F-H, within which the third was to determine rental (this case concerns the fixing of rental, but is nonetheless applicable to fixing of price). See also *Dublin v Diner* 1964 1 SA 799 (D) at 800A, where the valuers were required not to take goodwill into account when fixing price. For a third party required to adhere to prescribed methods and guidelines in determining a price, see also *Van Heerden v Basson* 1998 1 SA 715 (T) at 716.

180 *Bekker v RSA Factors* 1983 4 SA 568 (T); *Machanick v Simon* 1920 CPD 333. See also *Rössing Stone Crushers (Pty) Ltd v Commercial Bank of Namibia and Another* 1994 2 SA 622 (Nm) for the principle applied within a slightly different context (viz. valuation of property by a third in order to ascertain a reserve price below which the property could not be sold).

afforded to one of the parties. In the latter case, the power may be physically exercised by the third, but in its capacity as agent or representative of the contract party. In this context the oft-stated rule apparently applies, viz. that there will be no sale if the price is to be fixed by one of the parties or his or her nominee.[181]

2 5 2 References to third parties in practice

The following cases serve to illustrate the court's approach to price-setting by thirds.

(i) An early case where it appears that our courts accepted in principle that a price may be validly set by third, is that of *Searles v Maresky & Gershowitz*.[182] In this case, an option was given to the plaintiff to purchase a bar on the following terms: 'Goodwill £200, furniture about £50, stock about £25, license three-fourths of year'.[183] It was *inter alia* pleaded by the defence that there was no valid contract of sale (or option) in that the price of the stock and furniture had not been sufficiently fixed. The plaintiffs, however, contended that such an objection to the price was merely 'an afterthought', with the defence well knowing that, as in accordance with custom, the price of the furniture and stock would be fixed 'by valuation or agreement'.[184] The court, it seemed, agreed with this contention, and with plaintiff's argument with respect to price-fixing, and Maasdorp CJ concluded that with respect to the price the 'value of the furniture and stock [was] to be arrived at by valuation, if the parties cannot agree themselves'.[185]

This case is moreover an early indication in South African case law that a purchaser and vendor may (tacitly) agree to reach agreement later on the price, provided provision is made for some mechanism (e.g. valuation by a third, provided in this case by tacit adherence to custom) which shall ensure that a price is in fact set should for some reason the parties themselves fail to reach later agreement.[186] With respect to *Searles*, it should also be noted that the court apparently had no problem with the identity of the party who was to perform the valuation. Reference was made only to 'valuation', and not to a valuer. However, it seems there was an established custom with respect to valuations under these circumstances, and that therefore the custom of the day would determine who exactly was to perform the valuation.[187] In any event, a reading of the case suggests that Maasdorp CJ was not unduly impressed with the defence of uncertainty of price; it is clear that he was of the opinion that the parties involved were under no delusion as to price, or as to how it was to be ascertained.[188]

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181 E.g. Kerr *Sale* 54; Hackwill *Mackeurtan's Sale* 16; Mostert et al *Koopkontrak* 13; *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 2 SA 555 (A) 670D; *Reymond v Abdulnabi and Others* 1985 3 SA 348 (W) 351A.

182 1916 GWL 431.

183 433.

184 435.

185 438.

186 See the similar mechanism in modern law in e.g. *Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk* 1993 1 SA 768 (A), and the discussion on agreements to agree in general at 2 6 2.

187 432, 435.

188 Maasdorp CJ gives no reasons for his conclusion that the price was to be agreed upon later or decided by valuation (438); it would seem then that he would be in substantial agreement with

(ii) In *Macey's Consolidated (Pvt) Ltd v TA Holdings* the purchase price for a supermarket was fixed by means of a valuation done by an independent firm of valuers.[189] Similarly, in *Gillig v Sonnenberg* and *Dublin v Diner* the price of shares which were to be sold, was to be fixed by the auditors of the company in which these shares were held.[190] In *Macey's Consolidated (Pvt) Ltd v TA Holdings* reference was made specifically to the name of a firm of valuators.[191] In *Gillig v Sonnenburg*, however, the reference was to 'the auditor for the time being of the company'.[192]

(iii) In *Kirsch v Willetts* the price set for a sale of a hotel and furniture was to be fixed by two valuers, one of whom was to be appointed by the purchaser and the other by the vendor.[193] A similar mechanism is to be found in *CM Asbestos Co (Pty) Ltd v King Chrysotyle Asbestos Mines (Pty) Ltd and Others* where, in an option for certain mining claims, both seller and purchaser were each to appoint a geologist, and these geologists, thereafter, were together to calculate the purchase price.[194] Furthermore, provision had been made that in the event of disagreement, the geologists were to nominate mutually a third geologist, whose fixing of the price was to be binding. This deadlock-breaking mechanism is not found in *Kirsch v Willetts.*

2 5 3 Failure of references to third parties: examples from case law

The following cases illustrate the circumstances under which references to third parties have failed in the past. It will be seen that the approach of case law has been once again a casuistic one, and that judgements reflect the view taken by the court in question of the particular facts before it. Nonetheless, even on the view that each case should be treated on individual merit, some judgements appear to be in conflict.

(i) In *Reymond v Abdulnabi and Others* the respondent orally agreed to sell shares in a certain company to the applicant for a purchase price 'to be determined by an independent auditor'.[195] The court, however, stating the rule that if the determination of the price is left to a third party, such third party must be ascertained or ascertainable, found that the independent auditor was not an 'ascertainable person'.[196] The court contrasted this reference to those in

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plaintiff's counsel at 435. The judgement is mainly devoted to the question whether there had been the requisite consent between partners to sell. The contention, in any event, by plaintiff that the defence of uncertainty of price was an 'afterthought' (435) rings true. Plaintiff's counsel (435) contended that the plaintiff had tendered an amount and it appears that the defence had admitted this to be a reasonable tender. At the time of contracting, therefore, there cannot be said to have been any real dispute as to price, and the court, it is therefore submitted, was correct in its dismissive approach towards this defence.

189 1987 1 SA 173 (ZS).

190 1953 4 SA 675 (T) and 1964 1 SA 799 (D) respectively.

191 Above, at 174D.

192 Above, at 676H.

193 1930 EDL 9.

194 1953 3 SA 431 (W).

195 1985 3 SA 348 (W) 348I. The court assumed there to have been agreement (349D).

196 349I-350B.

Gillig v Sonnenberg and *Dublin v Diner*,[197] where reference was made to a *specific* company's auditors, and indicated that the reference as it stood entailed a reference to many auditors, and that consequently this person was not ascertainable without further agreement by the parties on this issue.[198]

(ii) In *Cassimjee v Cassimjee* certain stock, as part of a sale of a general business, was to be 'taken over [by the purchaser] at valuation'.[199] It was averred that the contract of sale was void for uncertainty because there was no indication as to how or by when the valuation was to be made, and consequently that no price could be determined. The court upheld this contention, agreeing that there had been no indication *inter alia* as to whom the parties intended was to make the valuation.[200]

This decision may be contrasted with the earlier decision of *Searles v Maresky & Gershowitz*, where the price for stock and furniture was also to be determined 'by valuation'.[201] As pointed out earlier, the court had no qualms in accepting this as a valid price determination.[202] With respect to the *Searles* case it has been suggested that the court, to its credit, was not taken in by a clearly technical defence based supposedly on uncertainty of price, or as counsel termed it, an 'afterthought'. The court, aided by the existence of a custom which provided for price valuation in these circumstances, recognised that price was not at issue between the parties, and thus refused to allow it to become a litigious issue.

In *Cassimjee v Cassimjee*, on the other hand, counsel specifically pointed out, and the court appeared to note,[203] that no dispute had ever been alleged as to the price with respect to stock. The court, however, was of the opinion that this should have been alleged in plaintiff's declaration, and thus stated that '[a]s it is, it is quite impossible for the court to enforce the contract as alleged'.[204] This may well be so, and a court, when required to grant an order concerning a contract, will understandably wish to be in a position to place some quantification on price. However, where it appeared the parties were in no disagreement as to the price term in question (although admittedly this was not alleged in pleadings), it might seem somewhat fastidious of the court to find the contract unenforceable on this issue. This is particularly so in that the attack based on the alleged uncertainty was one to be found in an exception to plaintiff's declaration. It would seem therefore, with respect, to be premature to find so strongly for the unenforceability of the contract on this ground, especially if there were indications that this would not be a disputed issue if the matter ran to full trial.

This stricter approach may also be seen in *Globe Electrical Transvaal (Pty) Ltd v Brunhuber*,

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197 Above.
198 350D-G.
199 1947 3 SA 701 (N) 705.
200 706.
201 1916 GWL 431. See the discussion above at 2 5 2.
202 To suggest that the court in *Searles* did not consider the matter, as evinced by the court's dispatching of the issue in a single sentence at the end of the judgement (438), would probably be inaccurate. Counsel for both parties specifically raised the issue and the court was thus obliged to consider it.
203 706.
204 Ibid.

where the applicant held an option to purchase shares in a certain trading company.[205] In terms of the option, the purchase price was dependent on the value of the company's stock in hand, which was to be determined by stocktaking. No date, however, was fixed for the stocktaking, and the applicant alleged that this was to be agreed upon later between the parties, or that it was to take place at a reasonable date. The court noted the importance of the date of the stocktaking, remarking that the value of stock in a trading company can fluctuate from day to day. Consequently without agreement as to the date of stocktaking, the price could not be said to be certain or ascertainable.[206] In this regard the court referred to the many difficulties that arose if one took into account the various possible dates for stocktaking, and doubted how it were possible to fix a 'reasonable' date.[207] The court, in finding for uncertainty not only with respect to price but also with respect to other provisions in the document, concluded that it was not a question of ambiguity or 'a question of balance between one meaning rather than another; [i]t [was rather] a question of what the parties intended to agree upon when the method they have adopted of expressing their intention leaves many points upon which agreement is necessary, completely open and at large'.[208]

(iii) In *Faatz v Estate Maiwald*, in a contract involving the sale of certain furniture, the parties agreed that the purchase price would be determined in the following manner: each party was to appoint its own appraiser; the two appraisers were together to appoint an umpire, and if they could not agree upon a common umpire, the magistrate of Windhoek or his nominee was to act as such.[209] This commission of three was then to fix the price. *In casu* two appraisers were appointed by the parties, and these appraisers thereafter, without appointing a common umpire, agreed upon a specific price. Van den Heever J held, however, that despite agreement by the two appraisers on price, there was no valid contract of sale. The contract, the judge remarked, specifically provided for valuation by a commission of three;[210] furthermore it had to be considered that the third member, if he or she had been appointed, might have persuaded the two appraisers to come to a different agreement on price.[211] Consequently the price had not been set in accordance with the method prescribed by the parties; the price ascertainment mechanism had therefore failed for incorrect application.

(iv) A similar situation was encountered in *Heymann's Estate v Featherstone*[212] where, in the sale of a share in a deceased estate, the contract provided that the price was to be determined by two valuers, to be appointed respectively by the purchaser and seller, and that, should these valuers fail to reach agreement, the price was to be determined by an umpire, who in the interim was to have been appointed by the valuers. The two valuers ultimately failed to agree upon a price, and when they approached the umpire for a final binding price, with respect to whom they had both assented, they were informed that owing to his public office, he was unable to act as umpire. The parties were thereafter also unable to agree upon any other person as umpire. The court firstly identified the umpire as 'interposed in substitution of a

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205 1970 3 SA 99 (E).
206 104A.
207 103B-E, 104A-D.
208 106B-C.
209 1933 SWA 73.
210 91.
211 Ibid.
212 1930 EDL 105.

machinery, which has proved ineffective', and consequently found the overall 'method' which was for the 'purpose of arriving at the price of the share to be bought ... [as] ineffective'.[213] The court, it said, could not supply another and thus accordingly there was no contract – unless, the court remarked, the parties could themselves 'find some way out'.[214]

2 5 4 Reasons for the failure of ascertainment mechanisms involving third parties

As apparent from the section immediately above, references to third parties have not been without difficulty. Many problems result simply from the parties' lack of care in providing for the nomination of a third party, or from oversight regarding the third party's availability, or a failure to make the third party sufficiently identifiable. Thus a reference to a third party may fail in a manner similar to other objective price ascertainment mechanisms. A reference to a third party who is not sufficiently identified is little different to where price is to be determined by reference to a price list or advertisement in a magazine, and neither the price list nor the advertisement is specified. In all these cases, there is a *general* breakdown in the price ascertainment machinery; it lacks the additional data required for operation. Whether such machinery may be fixed, especially in the context where a third party constitutes the former, is referred to shortly below.

There is, however, an additional problem specific to the situation where third parties ascertain price, and which cannot be said to be as similar to the examples of breakdown of price ascertainment machinery encountered in **2 3** and **2 4**. This is when the third party does indeed set a price (i.e. there is no *general* breakdown of the price ascertainment machinery), but he or she sets a manifestly unfair price. It is of interest here not so much for being a problem caused primarily by the subjective nature of this type of price ascertainment mechanism,[215] but because case law indicates a greater willingness of the courts in such circumstances to intervene, and, so to say, possibly 'fix' such a price ascertainment mechanism where it has 'malfunctioned' in this way. It shall thus be seen if the approach taken in this context may in any way find application elsewhere.

Thereafter, a brief examination will be made of the position in South African contract law regarding a general breakdown in third party price ascertainment machinery, and the independence required of the third party in the fixing of price.

2 5 4 1 Manifestly unfair price set by a third

2 5 4 1 1 Recent developments

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213 107-108, and 109 respectively.

214 109.

215 A manifestly unfair price is possibly most usually (and thus primarily) the result of *male fides* on the part of the third, or negligence in the exercise of his or her discretion. See for example the allegations in *Kirsch v Willetts* 1930 EDL 9. Nonetheless a price regarded objectively as manifestly unfair could result, however, from an objective price ascertainment mechanism. A formula, for instance, may be created so poorly by the parties that it results in a manifestly unfair price.

Initially, the law is clear in such circumstances: where a third party appointed by the parties to determine a price sets a manifestly unfair price, the parties are not bound by such a valuation. Thus in *Bekker v RSA Factors* it was said that a party would not be bound to the determination by a third party if this party had exercised his judgement so unreasonably, improperly, irregularly or wrongly that it would lead to manifest injustice or unfairness ('ooglopende onbillikheid').[216] This is because in agreeing that a third party or parties should fix the price, the parties 'do not intend an arbitrary but a just estimation'.[217]

But as to what happens further, as noted by Kerr, is a matter of controversy.[218] Two consequences are here possible. Firstly, it has been argued that on the setting aside of the manifestly unfair valuation, the court may substitute into the contract its own reasonable price and hold the parties bound to this. Secondly, it has also been argued that the court may indeed determine such a reasonable price, but then the so-called non-aggrieved party (i.e. the party not disadvantaged by the unfair valuation) may elect to accept either the court's determination or resile from the contract.

Generally, the courts have subscribed to the second proposition. A line of authority for this position is traced firstly to *Gillig v Sonnenburg*.[219] Here, the price of shares sold was fixed by a third party at a valuation which was so low that it was alleged to be manifestly unfair. While suggesting that after setting aside the unfair price the court could substitute the latter for a price of its own, Murray AJP expressly stated that the non-aggrieved party had the option to resile entirely from the contract or carry it out on the modified price. This was because such a party was entitled to resist a new contract being forced upon him.[220] The matter was thereafter raised again in *Dublin v Diner*,[221] but the question as to the correctness of the

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216 1983 4 SA 568 (T) 573E-F. The question as to under what precise circumstances a court may set aside a valuation is not here at issue. See here especially Butler & Finsen *Arbitration* 50 n 104 for a discussion of the approach followed by *Bekker v RSA Factors*, above, and that followed in modern English law (to which see *Campbell v Edwards* [1976] 1 All ER 785 (CA)) and in the Zimbabwean Appellate Division per *Macey's Consolidated (Pvt) Ltd and Another v TA Holdings Ltd* 1987 1 SA 173 (ZS). It does appear, however, that the grounds for setting aside a third party valuation in South Africa are wider than those permitted in England. In *Rössing Stone Crushers (Pty) Ltd v Commercial Bank of Namibia and Another* 1994 2 SA 622 (Nm) (which concerned the valuation of property by a third party in order to ascertain a reserve price below which the property could not be sold) the court remarked at 632E-H that common sense dictated that there must be a basis for the setting aside of a valuer's report even if there is no fraud, collusion or capriciousness involved (which is approximately the test followed in the *Macey* case above) and favoured setting aside where the valuation had been based on 'entirely wrong assumptions', even though made in good faith. Cf. however *Mufamadi and Others v Dorbyl Finance (Pty) Ltd* 1996 1 SA 799 (A) 804I-J for indications of a narrower test. But for the general position that in South African law a manifestly unfair price will not bind the parties see generally Kerr *Sale* 38-39, Mostert et al *Koopkontrak* 15, Hackwill *Mackeurtan's Sale* 17. Also *Gillig v Sonnenburg*, above, at 683F; *Dublin v Diner*, above, at 804E-F, 805B; *Total South Africa (Pty) Ltd v Bonaiti Developments (Pty) Ltd* 1981 2 SA 263 (D) 266H. For an exposition of authority in Roman-Dutch law that the parties are not bound to a manifestly unfair price, see especially Kerr *Sale* 38-39.

217 *Machanick v Simon* 1920 CPD 333 at 339, adopting Pothier.

218 Kerr *Sale* 39.

219 1953 4 SA 675 (T).

220 683D-F.

221 1964 1 SA 799 (D) 805A-B.

approach taken in *Gillig v Sonnenberg* was left open; it was, however, followed in *Total South Africa (Pty) Ltd v Bohaiti Developments (Pty) Ltd.*[222] In *Hurwitz and Others NNO v Table Bay Engineering (Pty) Ltd and Another*[223] the approach taken in *Gillig v Sonnenberg* was once again approved; importantly, however, Marais J in this case sets out the issues of policy dictating this approach.

Thus, in the *Hurwitz* case, a contract of lease provided that for the first five years rental would be the estimated fair monthly rental, and in the event of the parties failing to agree on this value each would appoint an independent valuer. The contract further provided that should the two valuers not agree, the question would be decided by an umpire jointly agreed upon, or failing such agreement, the President for the time being of the Law Society of the Cape of Good Hope, whose decision was to be final and binding. In the event, an umpire was required to be appointed and it became common cause that his determination of rent was manifestly unjust and unfair. Various proceedings were then exchanged, and the plaintiffs applied to amend their particulars of claim, which effectively sought a correction by the court of the rental and which would then be binding upon both parties. Marais J accordingly rejected this application to amend as, were it not to do so, it would be disavowing the defendant of its right to resile from the contract when the valuation by the third had been found to have been manifestly unfair.

In his judgement, Marais J firstly identified the chief notions underscoring the divergent opinions as to whether following the setting aside of a manifestly unfair price, the parties are bound by the Court's determination (which was made in the process of it determining whether the valuation fixed was indeed manifestly unfair), or whether either of the parties had an election to resile from the contract. With regard to the former, the court mentioned the reluctance of the courts to 'see contractual expectations founder upon the rocks of circumstances beyond the control of the parties', as well as the assumption that contracting parties, as reasonable people, should have no qualms about a court doing what they had been content to allow a third party to do.[224] With regard, however, to the approach to allow a party to elect not to be bound by the Court's valuation, Marais J noted that this rested chiefly upon the notion that because the Court was not the functionary chosen by the parties for the quantification of performance in issue, it was only fair that the party whose performance was to be quantified by the Court should be permitted to decide whether to abide by it or not.[225] Thereafter, rejecting the possibility that the parties might have tacitly agreed upon a binding power of correction to be granted to the courts, Marais J went on himself to examine whether anything could indeed be said for the view that it was an *ex lege* term of such agreements that the parties would be required to abide by the determination of the court.

In sum, this proposition Marais J found most unattractive. The thrust of his finding was that a fixing of a price[226] by a court was the making of a new contract for the parties. It was a method of quantifying the price 'radically different from what the parties bargained for and

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222 1981 2 SA 263 (D) 266H-267A.
223 1994 3 SA 449 (C).
224 453F-G.
225 Ibid.
226 While the contract *in casu* was a contract of lease, Marais J refers repeatedly to price.

potentially prejudicial to both their pockets and their peace of mind'.[227] Counsel for the plaintiffs had contended that where an unfair and unreasonable price set by a third party was set aside by the court, and substituted for by one by the court, the court was merely correcting the price to make it correspond with that to which the parties had already agreed, viz. a fair and reasonable price. To this Marais J contended that

> [t]he fact remains that the parties had *not simply agreed that the price should be fair and reasonable*. They had *specifically agreed* that it should be quantified *by a named third party*. It is implicit in that they did not wish to have to resort to a Court for a quantification. If the price to be paid is a price to be determined by a Court, it is a price which will not have been determined in the way in which the parties agreed it should be determined. In the light of that, it seems entirely reasonable that the parties should be free to decide whether or not to accept determination ... (my emphasis)[228]

As further justification for this view, Marais J also noted that the setting of a price by the court was a litigious and adversarial process, which the parties would never have intended rent (or price) fixing to be. This process, moreover, was expensive, as it involved legal costs, and as subject to potential appeal, carried the potential of yet further delay. While not said so expressly, Marais J would clearly seem to suggest that such a process should not be foisted upon the parties by the court. The court's *initial* determination of what constituted a reasonable price, on the other hand, was not akin to making the contract for the parties as it was merely a necessary step in deciding whether the third party's assessment was indeed manifestly unreasonable.[229]

Finally, Marais J appeared to find justification for this 'circumscribed correcting power of the Courts' in the principles underlying the doctrine of *laesio enormis*, but was careful to note the power *in casu* was distinct from the power to be found in the latter doctrine, and thus had survived the statutory abolition of *laesio enormis*.[230]

Kerr, however, advocates a different approach.[231] He suggests that the question as to whether any determination of reasonable price by the courts should be made binding on the parties or not should be answered by enquiring what solution comes closest to the parties' original intention.[232] He notes that there may be cases of references to thirds where the parties wish

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227 455A.

228 455E-F.

229 454H.

230 456E-G. Interestingly, at 455H Marais J expressly rejects (although, admittedly, 'speaking broadly') any inherent power of the courts 'to relieve parties of the obligations undertaken by them on the basis of appeals *ad misericordiam* or nebulous appeals to 'equity"'. It is not clear, therefore, upon what *precise* principles Marais J would base the corrective power of courts to set aside an unjust valuation (and substitute its own, where this election is made by the respective party), and which is so closely akin to *laesio enormis*. The courts in both *Gillig v Sonnenberg*, above, at 682, and *Dublin v Diner*, above, at 804A-B, are by contrast both clear that considerations of equity underlie the latter doctrine.

231 For the following discussion, see generally Kerr *Sale* 48-51.

232 *Institutiones Justiniani* 2 1 40: 'Nothing is more in accord with natural equity than to give effect to an owner's intention, when he wishes to make his property over to someone else' (Lee's translation) (quoted by Kerr, ibid., at 48).

the price to be determined by a specific person, *and by that specific person alone*. This may be because of the trust they hold in this party, or the particular skill this person possesses. Accordingly, where the court finds for an express or tacit provision that the parties intended a determination by the third party originally nominated and no other, then the court would not be justified in holding its own substituted price (or one the court has ordered to be determined by another third party) as binding upon the parties. To do so here, would be to make the contract for the parties. Where however, there is no such express or tacit provision - that is, the nominated third is, for instance, simply part of a general class or group, and there is no evidence to suggest that they knew him and trusted in his assessment alone within a certain field - the parties can then be shown simply to have intended a reasonable determination. Thus the nomination of 'the auditor for the time being of the company' in *Gillig v Sonnenburg* indicates that the parties required merely a reasonable determination, and did not regard the assessment by a particular person as essential for the determination of this issue; the same might also be said for the similar nomination in *Dublin v Diner*, or the appointment of an umpire in *Hurwitz and Others NNO v Table Bay Engineering (Pty) Ltd and Another*, in the latter case not by the parties themselves or their valuers but by the President 'for the time being' of the Law Society of the Cape of Good Hope, whoever he or she may be.[233] In such cases, Kerr submits there exists a residual (*ex lege* or *naturalia*) provision in our law, and this residual provision gives effect to this presumed or deduced intention of the parties, viz. that the parties intend merely a reasonable, just determination, and not an arbitrary one, and that provided such a reasonable determination can be obtained, they wish the contract to continue. The courts may then give effect to this *ex lege* provision by substituting the unfair price set by the third for a reasonable and just price set by itself, and thus permit the contract to remain on footing. Kerr emphasises in this respect that the court's determination of a fair and just price will be based upon evidence tendered before the court by the parties themselves;[234] accordingly, the parties supply the court with the information necessary to arrive at such a price. Thus in this respect too, the court's perspective of what constitutes a reasonable price cannot be said to be foisted upon the parties.

Moreover, it appears that Kerr finds in the principle of good faith a dogmatic basis for this *ex lege* provision. The writer regards the basis for this approach as, in particular, 'equity, fairness and justice', which in turn it appears he regards as an expression of the general remedy *ex bono et aequo* available to a judge in all *bonae fidei* contracts.[235]

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233 Ibid., at 50. It is suggested this also applies to *Faatz v Estate Maiwald* and *Heyman's Estate v Featherstone*, above.

234 Ibid., at 51.

235 Ibid., at 48. Mention is also made that the *actiones ex empto* and *ex vendito* were *actiones bonae fidei*, which gave to a judge a general equitable discretion to correct an unfair price set by a third party. For support of this proposition see in particular Kerr's citing at 40 of Vinnius 3 24 1 (support which Marais J in *Hurwitz and Others NNO v Table Bay Engineering (Pty) Ltd and Another* 1994 3 SA 449 (C) at 454 found doubtful), and Voet 18 1 23, and his discussion of Voet at 41-42. Note also that Wessels *Contract* 142 states, on reference to Voet 18 1 23 and *Digesta* 17 2 79, that '[i]f the arbitrator's [meaning here a valuer or third party, and not in the *quasi*-judicial modern sense of the word] decision is given *male fide* or if it is manifestly so inequitable as to infer *male fides*, then also the Court can be asked *ex aequo et bono* to determine the object of the obligation'. Lotz *Purchase* 368 is also of the opinion that Voet 18 1 23 finds current application in our law, although in 'somewhat modified form'; presumably, Lotz refers here to the modern view that the court's correction is not necessarily binding. Kerr's interpretation of the old authorities would appear also to find support in

Support for the approach taken by Kerr can furthermore be found in the important House of Lords decision of *Sudbrook Trading Estate Ltd v Eggleton*.[236] For while an English decision, the logic of the latter is compelling. In this case, certain options to purchase land had been granted to a number of lessees. In each case the option price was to be fixed by two valuers, one to be appointed by the lessors, and the other by the lessees, and on the valuers' failure to agree, the price was to be fixed by an umpire appointed by the valuers. The lessors, however, refused to appoint a valuer, and consequently argued that the option was void for uncertainty. Nonetheless, the House of Lords held that the provision for fixing the price by the valuers was a decisive indication that the contract was to be construed as an agreement to sell at a fair and reasonable price, as valuers were professionals who would be obliged to apply professional and hence reasonable standards. Consequently if the intended machinery for the determination of price breaks down (as in the failure of a party to appoint a valuer), the court will substitute its own machinery and supply its own reasonable price, and enforce the contract accordingly. Thus Lord Fraser of Tullybelton expressed himself as follows:

> I think the defect lies in construing the provisions for the mode of ascertaining the value as an essential part of the agreement ... In the ordinary case parties do not make any substantial distinction between an agreement to sell at a fair value, without specifying the mode of ascertaining the value, and an agreement to sell at a value to be ascertained by valuers appointed in the way provided in these leases. The true distinction is between those cases where the mode of ascertaining the price is an essential term of the contract, and those cases where the mode of ascertainment, though indicated in the contract, is subsidiary and non-essential ... [W]here an agreement is made to sell at a price to be fixed by a valuer who is named, or who, by reason of holding some office such as auditor of a company whose shares are to be valued, will have special knowledge relevant to the question of value, the prescribed mode may well be regarded as essential. Where, as here, the machinery consists of valuers and an umpire, none of whom are named or identified, it is in my opinion unrealistic to regard it as an essential term. If it breaks down there is no reason why the court should not substitute other machinery to carry out the main purpose of ascertaining the price in order that the agreement may be carried out.[237]

Mostert et al *Koopkontrak* who at 15 suggest that the view that the parties are not bound to any fair price determined by the court would be in conflict 'met die bedoeling van die skrywers wat te kenne gee dat die hof die prys verminder of vermeerder, na gelang van die geval'.

236 [1983] 1 AC 444, [1982] 3 All ER 1 (HL).

237 483E-484A. Also Lord Diplock at 479. This case actually concerned the situation where one of the parties had refused to appoint a valuer, and thus concerns the situation where one of the parties prevents the third party from fixing a price. In South African law, such a situation is discussed separately and is distinguished from the case where the third party does fix a price, but an unreasonable one (as above), or from cases where the third party fails to fix a price through no fault of either party (e.g. he dies, or refuses to act, and where it seems, as apparent in cases such as *Heyman's Estate v Featherstone* 1930 EDL 105, the law offers no remedy and simply regards the contract as incomplete). There is some controversy as to what remedies are available to a party where his or her co-contractant contrives to prevent the third from making his or her determination. Belcher *Norman's Purchase* 66 suggests an analogy may be made with the fictional fulfilment of conditions, while Mostert et al *Koopkontrak* 14 suggest an action may lie in breach of contract. See in general Kerr *Sale* 37-38. In any event, it is important that while Lord Fraser recognised that such a distinction might also be made in English law, he did not regard it of such import to prevent him from applying the general principle that where the machinery is not essential and breaks down (and thus whether for

It may be noted here that Lord Fraser's remark above that the appointment of an auditor of a company whose shares were being sold may well make such a prescribed mode essential, might seem to contradict Kerr's opinion that the determination by the auditor in *Gillig v Sonnenburg* merely reflected the parties' intention to obtain a reasonable determination.[238] This is not necessarily the case; no hard and fast categories can be drawn. It is clear that both his Lordship and Professor Kerr regard this as a question of fact: the court must be careful to determine the parties' intentions from the facts and circumstances of each case.[239]

It is also submitted that these views have similarly been expressed in *Lobo Properties (Pty) Ltd v Express Lift Co (SA) Pty) Ltd* where, in a somewhat different but nonetheless related context, De Villiers AJ stated the following:

> Where the mutual intent to contract is clear, and in the absence of circumstances justifying an inference of a *de facto* intent to be bound by some specific criterion, our Courts appear to favour an implied intent to be bound to what is fair and reasonable ... [240]

Finally, mention must be made of the most recent decision on the matter. In *Van Heerden v Basson* plaintiff and defendant were the only directors and shareholders of a certain company. It had been agreed upon between themselves that in the event of either shareholder wishing to sell his shares, these shares were to be sold to his co-shareholder. The price of the shares was, moreover, to be determined by a valuation made by the current auditor of the company 'met inagneming van die erkende metodes in die bedryf en in samewerking met kundige persone op die gebied'.[241] Plaintiff at some stage then resigned as director and signed a blank transfer form in order to effect the transfer of the shares to the plaintiff. It was then alleged that the shares were never valued in terms of the manner prescribed in the parties' agreement, and a unilateral valuation ('eensydige waardebepaling') of R80 000 was placed on the shares by the defendant.[242] Plaintiff then alleged that the valuation had not been made in terms of the norms set out in the parties' agreement to this effect, and that the valuation was consequently irregular, incorrect, and manifestly unfair. It would appear thus that this unilateral valuation had in fact been effected by some other valuer (i.e. other than the one envisaged in the parties' agreement) as the plaintiff requested from the court an order that it not be bound to the valuation 'van die waardeerder'.[243] Furthermore, the plaintiff requested that the court itself determine the value of the shares, as well as that thereafter, the defendant be ordered to decide within a certain time period whether to purchase the shares or not, and where electing not to so purchase, to return the shares transferred. Thus it is clear that the plaintiff was asking for nothing more of the court than that permitted in *Hurwitz and Others NNO v Table Bay Engineering (Pty) Ltd and Another*.[244]

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a reason beyond the control of the parties *or whether for a reason that can be attributed to the fault of one of the parties*), the court will in any case substitute its own machinery (484B-C).

238 Kerr *Sale* 50, and see above.

239 See for instance the careful manner in which Kerr (ibid., at 49) approaches the application of the bystander test in such circumstances.

240 1961 1 SA 704 (C) 708H. See further the discussion of a reasonable price at 2 3 2 above.

241 1998 1 SA 715 (T) 716E-F.

242 716G.

243 717D.

244 1994 3 SA 449 (C).

On the other hand, it would also appear that strictly speaking, the situation *in casu* was not a case where a designated third party had fixed a manifestly unfair price. Indeed, an unfair price was alleged to have been set, but it would appear this had not been fixed by the auditor of the company. In fact, who exactly fixed the price is not entirely clear from the judgement; it may indeed have been the defendant himself (which might follow from the allegation of an 'eensydige waardebepaling'), or alternatively, as suggested above, by some other 'waardeerder', possibly unilaterally appointed by him. In any event, the fact that the price was not set by the agreed upon third party indicates that this is rather a case concerning the simple failure of a third party to fix a price (i.e. the breakdown of the third party machinery). This is distinguishable from that narrow class of cases falling under the rules to be found in, for instance, *Hurwitz and Others NNO v Table Bay Engineering (Pty) Ltd and Another*, and *Dublin v Diner*,[245] where the third party does act, but fixes an unfair price. Be that as it may, the court in *Van Heerden v Basson* freely applied the principles of such latter cases, which may suggest that the corrective power held to accrue to the courts in circumstances such as found in *Hurwitz*, *Dublin* and *Gillig*, may find application in other circumstances too. This will be dealt with in the section below.[246]

On the assumption, however, that *Van Heerden v Basson* is indeed a case appropriate for the application of principles as found in *Hurwitz* and *Gillig*, it takes matters further on a number of issues. Firstly, Hartzenberg R unequivocally distinguished the doctrine of *laesio enormis* from the position where a correction is effected to a price fixed by a third party, and rejected the contention that South African case law such as *Hurwitz* and *Gillig* found a basis for such a correction in the former doctrine.[247] While this is no doubt true (a reading of *Hurwitz*, for instance, leads one conclude at most that the court *in casu* found a relevant basis in principles akin but nonetheless distinct from those to be found in *laesio enormis*[248]), Hartzenberg R does not go any further in examining the dogma behind such a power (such as the principle of good faith, as would be suggested by Kerr[249]). Secondly, the judge stated also as follows:

> ... [I]n die geval van die regstelling van die prys wat vasgestel is deur die derde [is] die prys eintlik objektief bepaalbaar en ... dit [is] bloot vir die derde om 'n redelike vasstelling to maak. Indien hy 'n redelike vasstelling maak is die partye natuurlik daaraan gebonde. Is sy vasstelling onredelik en dit word vervang met 'n redelike vasstelling *is daar baie te sê vir die standpunt dat die partye steeds gebonde moet wees* aan die ooreenkoms. Dit is natuurlik nou bloot in beginsel en indien daar nie in aanmerking geneem word dat daar 'n groot tydsverloop kan plaasvind tussen so 'n tweede vasstelling en die oorspronklike vasstelling nie, of dat daar groot koste verbonde kan wees aan so 'n tweede vasstelling nie. (my emphasis)[250]

Thus Hartzenberg R, at least in principle, would hold parties bound to any substitute determination of price by the courts, because - and this would appear to be stated likewise as the general point of departure - the third party is simply required to make a reasonable valuation. This in some measure corresponds to the general point of departure followed by

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245 1964 1 SA 799 (D).
246 At 2 5 4 2.
247 718B-720A.
248 See the discussion of this case above.
249 See the discussion of the approach of Kerr, above.
250 719C-D.

Kerr, viz. that in the absence of evidence indicating otherwise, the law (in the form of an *ex lege* provision) may take the parties to have intended a reasonable determination when appointing a third to set the price.

Hartzenberg R thereafter notes that there exists a line of authority opining that following a correction by the courts, an election must be given to the other party whether to accept the correction and remain bound to the contract, or to resile.[251] This the judge found acceptable. However, unlike the court in *Hurwitz* which emphasised that to hold the parties to the determination by the court entailed that price was being set by a functionary that had not been chosen by the parties,[252] Hartzenberg R emphasised reasons that, while raised in the *Hurwitz* case,[253] were not significantly stressed. The reason for granting the party an election lay in more practical concerns. It did not seem to matter overly to Hartzenberg R that price was being set by a functionary not selected by the parties, but that the parties should have a choice not to get involved in the long, costly litigation necessary for a court to set such an alternative price.[254] It might here be argued, as Kerr might appear to do,[255] that logically, what amounts to a fair, reasonable price will largely already be determined by the court during the course of its task to determine whether the price set by the third is indeed a manifestly unfair price. Consequently, the fears of court costs and delays would be exaggerated. For in determining whether the price set by a third is indeed unfair, the parties will already find themselves in court. Admittedly, however, the final and conclusive determination of a substitute reasonable price may require additional expense and may take the form of a judicial process separate from and additional to the process where the court was merely required to find whether the third's price was unfair or not. Conceivably therefore, such an election to resile and thus avoid being caught up in further costly litigation to determine a reasonable price, could be exercised immediately upon the court's finding of a manifestly unfair price, but before it set about the business of determining what *exactly* constituted a reasonable price in the circumstances. In addition, it would also seem that Hartzenberg R envisaged such an election being exercised *before* the matter wound its way to court at all, in the sense that on the parties recognising that an unfair price had been set, one of the parties could choose simply to regard the contract as void, rather than becoming involved in costly litigation at the conclusion of which he will in any event have the election to resile.[256] Hartzenberg R also submitted that on these reasons, in that they could concern both parties equally, there was no ground for restricting the election to resile to one party only (the so-called non-aggrieved party), as would appear to have been the position in the past.[257]

2 5 4 1 2 Concluding remarks

The discussions in *Hurwitz*, *Van Heerden* and *Sudbrook*, as well as that to be found in

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251 720B.
252 *Hurwitz and Others NNO v Table Bay Engineering (Pty) Ltd and Another* 1994 3 SA 449 (C) at 453G and 455E-F, and see the discussion of this case above.
253 Ibid., at 454D-E.
254 *Van Heerden v Basson* 1998 1 SA 715 (T) 720C-D.
255 Kerr *Sale* 53.
256 See 720D.
257 720F-G.

Professor Kerr's *Law of Sale and Lease*, are all valuable, and each offers its own particular insight. It is submitted, however, that in principle, the approach of Kerr should be followed, not least because it allows the courts, before deciding whether to hold the parties bound to a reasonable price it itself has determined, to take the peculiar circumstances of each case into consideration. The main objection (to the non-recognition of the election to resile) raised by Marais J in *Hurwitz*, viz. that a functionary other than the one selected by the parties is permitted to bind the parties, is dealt with adequately by Kerr's approach, and by that followed in *Sudbrook Trading Estate Ltd v Eggleton*. Thus where there is evidence that the third party designated by the parties (the functionary) is essential to the process of price determination, then the court will not substitute a reasonable price as a binding substitute on the parties. However, where the *functionary* is not important, but rather the *result* i.e. the parties intend simply that a reasonable price must be set, then there is a good deal to be said for holding the parties to the reasonable price supplied by the court. The strength of Kerr's approach is that it is broad and flexible enough to take such intentions specifically into consideration.

Likewise, however, something might well be said for the objections raised in *Van Heerden v Basson*. The ascertainment by the court of a reasonable price to replace that set by the third may well entail additional costs and great delay. The parties will be required to tender evidence and this may be in complete contrast to the original purpose in making reference to a third party, i.e. the ensuring of a speedy and relatively cheap ascertainment of price. On the other hand, as pointed out by Kerr, it is surely unfair to allow a party to escape from a contract simply because the third party has done a poor job.[258] This surely does not conform to the parties' original intention of entering into a binding contractual relationship. What of the contractual expectations in this respect? Kerr here cites (amongst three examples all of which illustrate the point)[259] the case where C buys shares from D so as to enable him to gain control of a company. The share price is to be determined by the auditor of the company, and he sets a price which is manifestly too low. The seller objects and, as he is not bound to any substitute price determined by the courts, is permitted to resile. Must the buyer's remedy lie solely in damages against the third party?[260] This, after all, will not grant him control of the company. Moreover, Kerr notes, share prices fluctuate. The auditor might set a manifestly low price, and in the interim, following the date of sale, the shares may increase in value on the market. Thus the seller may set the contract aside, obtain restitution of the shares, and consequently re-sell them at a profit, thus depriving the buyer of the benefit of his contract.

It is submitted, therefore, that while the question is a difficult one, the parties should not be afforded an automatic right to resile on the setting of a manifestly unfair price by a third party. The courts should possess a binding corrective power but before exercising such power, should take all factors into account. The courts here should follow the original intentions of the parties. In ascertaining this intention, the courts should not only enquire as to whether the parties intended the price valuation to be made by a particular third party and no other, but also whether the parties placed such stock on a speedy and inexpensive ascertainment of price, that they would not be prepared to involve themselves in further litigation. Such an intention

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258 Kerr *Sale* 51-52.

259 Ibid.

260 Kerr does not mention this possibility in his example, but it constitutes clearly some form of remedy for the buyer. See e.g. Hackwill *Mackeurtan's Sale* 17.

of the parties may be found, on sufficient evidence, to constitute a tacit term of the agreement, and should thus compel the court not to hold as binding its own reasonable substitution where this would involve additional expense and delay.

2 5 4 2 General failure of a third party to set a price

In cases where a third party has been appointed to fix a price, it may be that for some reason no price is in fact fixed by him. Thus a reference to a third may fail as a result of the neglect of the parties to identify the third or to make him or her identifiable.[261] Similarly, the parties may provide for the appointment of a third party, but may fail to agree upon his or her nomination, or may simply fail to make the appointment.[262] Alternatively, it may be so that even if agreed upon, the third party cannot or will not act.[263] In such cases, it has consistently been held that the court cannot intervene to appoint another valuer or make a valuation itself, and that the contract must consequently fail.[264] In *Heyman's Estate v Featherstone*, for instance, the court said that there was no 'possible justification for the court's intervention', in that the parties had prescribed a method whereby a price was to be determined, and that this had 'proved ineffective, and the court [could] not supply another'.[265] Moreover, a third party may fix a price, but not in accordance with the methods or conditions prescribed. In such a case too, the court has been of the opinion that no binding or legally relevant price has been set, as the fixing was not done in accordance with the method prescribed, and the court has refused to intervene and substitute its own machinery.[266]

In the light of the approach taken by Kerr, and the House of Lords in *Sudbrook Trading Estate Ltd v Eggleton*, as discussed immediately above,[267] it is suggested that this approach of the courts is due for reconsideration. Thus following the approach of Kerr, one could equally here examine the facts and circumstances of the case at hand and ascertain whether any tacit term could be implied that would prevent the courts from deducing that the parties, by their appointment of a third party, intended simply that a reasonable and fair price be fixed. Thus in the absence of indications suggesting a contrary intention, where a third party fails for some reason to fix a price, the courts should be permitted to substitute the failed machinery of the parties with its own machinery, and thus fix a price. The same circumspection which, it was submitted, the courts should apply before holding the parties to a substituted reasonable price

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261 For example, *Reymond v Abdulnabi* 1985 3 SA 348 (W). For the facts of this case and the cases referred to in the footnotes below, see 2 5 3.

262 *Heyman's Estate v Featherstone* 1930 EDL 105, and *Faatz v Estate Maiwald* 1933 SWA 73 respectively.

263 E.g. the magistrate in *Heyman's Estate v Featherstone*, above.

264 *Heyman's Estate v Featherstone* above, at 109; *Faatz v Estate Maiwald* above, at 90; *Gillig v Sonnenburg* 1953 4 SA 675 (T) 679C; Butler & Finsen *Arbitration* 47; Belcher *Norman's Purchase* 65; Mostert et al *Koopkontrak* 13. Here it is important to note the distinction between a third party appointed as a price valuer and a third party appointed as an arbitrator. In the latter case, the power of the court to intervene is more extensive and governed generally by statute. See in general Butler & Finsen, ibid., at 44-50.

265 Above, at 109.

266 *Faatz v Estate Maiwald*, above, where the two valuers failed to appoint an additional valuer as required.

267 At 2 5 4 1 2.

in the case of an unfair price set by a third, should likewise be applied here.

This view comes across even more forcibly in the *Sudbrook* case. *In casu*, the position was exactly that at issue: namely, the envisaged third party had *failed* to set a price because he or she had not been appointed. The third party machinery, in other words, had failed to function. Since *Milnes v Gery*[268] the principle had generally been held in English law that in ascertaining essential terms such as price, the court will not substitute machinery of its own for machinery provided by the parties, however defective that machinery proves to be.[269] This principle was rejected[270] and, as evident in the lengthy citing of Lord Fraser above,[271] a distinction was made between machinery which may be regarded as essential and machinery which was to be regarded as subsidiary and non-essential, the function of which was to serve towards the ascertainment of a reasonable price. The principle was accordingly stated rather to be that where the machinery was not essential, the court will substitute its own machinery if it breaks down. As noted earlier, Lord Fraser was moreover not prepared to distinguish the situation where the breakdown in machinery had occurred as a result of some cause outside of the control of either party, and where the breakdown had occurred as the result of fault on the part of the one party; in his view, the principle that a court may substitute its own machinery was to apply in both cases.[272]

It would also appear, from a study of the facts of the case, that *Van Heerden v Basson* does not concern the case at all of a manifestly unfair price set by a third. As indicated in the discussion of this case above,[273] it would appear that the price complained of was set by some other party, that is, by some party other than the designated or agreed upon third. The agreed upon third party, accordingly, had set no price. Strictly speaking, this therefore is a case of a general breakdown in third party machinery. Nonetheless, the court clearly foresaw some possibility of a corrective power of the courts (i.e. some form of substitution), although agreed that the parties in question retained the right to resile and not be bound to any price fixed by the courts. Nonetheless, unless the failure to distinguish the two situations in question was an oversight on the part of the court, it does strengthen the argument that, logically, no distinction should be made where a third party fixes a manifestly unfair price, and where he or she fails to fix one at all. In both cases, one has simply to do with the breakdown of the third party machinery: the machinery has not operated *as envisaged or intended.*

One might finally refer to the general position in American law. In § 2-305 (1) of the American Uniform Commercial Code, it is provided that the parties, if they so intend, can conclude a contract for sale even though the price is not settled. It is thereafter specifically

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268 (1807) 14 Ves Jun 400.

269 The basis of this principle appeared to be that until the price had been fixed by the parties' machinery, there was no agreement for the court to save and enforce! See *Milnes v Gery*, above, at 406, and the *Sudbrook* case at 476 and 482. As pointed out in the latter by Lord Diplock (478C), such reasoning involves a fundamental fallacy: a contract is complete as soon as the parties have reached agreement as to what each of its essential terms are *or when they can with certainty be ascertained.*

270 Indeed, at 479G Lord Diplock regarded it as '[not] fit for survival in a civilised system of law'.

271 See 2 5 4 1 1.

272 484B-C.

273 At 2 5 4 1 1.

provided that in such a case the price will be a reasonable one at the time of the delivery if, *inter alia*, 'the price is to be fixed in terms of some agreed market or other standard *as set or recorded by a third person or agency* and it is not so set or recorded'.[274] Broadly speaking, this corresponds to the general position taken up by Kerr, viz. that *generally*, parties intend a third party merely to function as an ascertainer of a reasonable price. Hence, where a third party fails to fix the price in American law, the Uniform Commercial Code is happy to provide for a reasonable price as a substitute.

Importantly, however, § 2-305 (4) provides an exception. It is stated thus that '[w]here, however, the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract'. The rest of the section thereafter provides that in such a case, the buyer must return any goods already received or if unable to do so, is obliged to pay their reasonable value at delivery, and the seller is obliged in turn to return any portion of the price already paid.

In this respect, point 4 of the Official Comment to § 2-305 is worth citing in full:

> The section recognizes that there may be cases in which a particular person's judgment is not chosen merely as a barometer or index of a fair price but is an essential condition to the parties' intent to make any contract at all. For example, the case where a known and trusted expert is to 'value' a particular painting for which there is no market standard differs sharply from the situation where a named expert is to determine the grade of cotton, and the difference would support a finding that in the one the parties did not intend to make a binding agreement if that expert were unavailable whereas in the other they did so intend. Other circumstances would of course affect the validity of such a finding.[275]

This corresponds closely with the distinction made in the *Sudbrook* case between essential and non-essential price ascertainment machinery. It also emphasises that in the final instance, it remains a question of fact as to how essential is the judgement of a particular third party, or the ascertainment by a particular type of price machinery.

2 5 4 3 The independence required of a third party

The rule is frequently cited that price may not be set by one of the parties or his or her nominee.[276] It might appear, therefore, that parties may only agree upon an independent party to determine price.

However, it would seem today that for a reference for a third to succeed, it is not expected of a third that he or she be entirely independent of both parties; what is expected, rather, is that this person gives an honest judgement – an *arbitrium boni viri*. It is this element that provides the objective standard required in price ascertainment mechanisms. In *Estate Milne v Donohoe Investments (Pty) Ltd and Others* the auditor of a company was required to fix the price of shares which were to be offered for sale. It was contended, however, that as a shareholder, he

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274 § 2-305 (1) read with § 2-305 (1) (c), my italics.
275 *Uniform Commercial Code, Official Text* 86-87.
276 See 2 5 1.

was, in terms of the particular conditions of the offer of sale, likewise a potential purchaser. Ogilvie Thompson JA, however, expressed himself as follows:

> His function is that of valuer (*arbitrator*, *aestimator*), as distinct from that of an arbitrator (*arbiter*), properly so called, who acts in a *quasi*-judicial capacity ... The *arbitrator* or *aestimator* need not necessarily be an entirely impartial person. In discharging his function he is of course required to exercise an honest judgement, the *arbitrium boni viri*; but a measure of personal interest is not necessarily incompatible with the exercise of such a judgment ... Provided, therefore, that in valuing shares pursuant to ... the articles, the auditor exercises an honest judgement, he is not, merely by reason of being a shareholder in the company and thus a potential purchaser of the shares offered for sale, in my opinion precluded from discharging the function assigned to him by that clause.[277]

While therefore this case may be distinguished from that precisely at issue in that the auditor took upon more the capacity of a party itself in the sale (as opposed to a nominee or agent), the dictum clearly applies in general to third parties appointed as valuers.[278] This has been confirmed elsewhere.[279]

The reference to *Estate Milne v Donohoe Investments (Pty) Ltd and Others* indicates, in any event, that the legal position where a party itself is granted the power to fix a price may not be that dissimilar to that pertaining where a third party, not entirely independent of one of the parties in question, is appointed to make the valuation. The recognition that the third need not be entirely independent, and thus take (or come close to taking) the position of party agent, provided that it exercise its discretion reasonably, has important implications for the recognition of price-fixing powers given expressly to parties themselves. This shall be referred to again later.[280]

2 5 5 Application in the context of other ascertainment mechanisms

The discussion above suggests that while the nature of the problems encountered by

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277 1967 2 SA 359 (A) 373H-374D.

278 To what extent a party itself may set a price is examined in detail under 6 4. Aside from the requirement that the auditor exercise an honest judgement, the *arbitrium boni viri*, the court in *Estate Milne* also observed that an additional circumstance served to limit his power to set the price viz. that should the purchaser or seller be dissatisfied with the auditor's price, the matter could be referred to arbitration.

279 See Van Jaarsveld *Handelsreg* 299 n 137; Van der Merwe et al *Contract* 164; Lubbe 1990 *AS* 124; Hawthorne 1992 *THRHR* 643. Also *Mayfair South Townships (Pty) Ltd v Jhina* 1980 1 SA 869 (T) 874F-875D; *Hoffman v Meyer* 1956 2 SA 752 (C) 758C-F. In *Dublin v Diner* 1964 1 SA 799 (D) it appears (at 799H) that the seller was the sole beneficial holder of the entire share capital of the company whose shares he was selling. It is likewise here a moot point whether the auditor of such a company can be said to be independent. Cf. also *Proud Investments (Pty) Ltd v Lanchem International (Pty) Ltd* 1991 3 SA 738 (A), where the court accepted that rent could be determined by the third party in question, viz. the landlord's auditors; Hawthorne (644) criticises this as saying that in effect, this amounts to the rent being 'determined by the lessor'. See also Wessels *Contract* 1094 who doubts Voet's proposition that a contract is void when a purchaser or vendor is permitted to appoint a third party to fix the price.

280 See in particular 6 4.

ascertainment mechanisms involving references to thirds does not necessarily differ greatly from those encountered by other price ascertainment mechanisms, the scope for judicial intervention appears greater. Substitution by the court of a reasonable price is a possibility in cases where the appointed third party sets a manifestly unfair price, and it has been suggested that this should be equally so where for some other reason the third party fails to set a price as envisaged. In particular it is submitted that the distinction made in English law between essential and non-essential price ascertainment machinery may be usefully applied in South African law. Where price ascertainment machinery is regarded as non-essential, the primary intention of the contractants is not that the machinery in question must effect ascertainment, but that the price eventually ascertained is a reasonable one. Importantly, however, the House of Lords in *Sudbrook Trading Estate Ltd v Eggleton* indicates that this distinction may be made not merely within the context of third party price valuation, but within the context of price ascertainment *in general*. Moreover, the emphasis on such an approach is on giving effect to the intention of the parties. Accordingly, there would appear to be scope for the application of this distinction in cases where parties attempt to provide for the later ascertainment of price by way of reference to an external standard, or by calculation, but for some reason fail in this attempt. Provided, therefore, that the intention of the parties continues to be borne in mind in similar manner to that evident in the approach of the House of Lords, a South African court, in principle, should be similarly entitled to substitute its own reasonable price in the event of the failure of the original ascertainment mechanism. In giving effect to the parties' intention of contracting at a reasonable price, the court could not be accused of making the contract for the parties.

2 6 'Recourse to the parties': ascertainment involving the parties themselves

2 6 1 Introduction

Thus far, attention has been afforded to the following mechanisms: reference to external facts, formulae requiring calculation, and price determination by third parties. As indicated, the approach of our law to price ascertainment has been casuistic; this classification, therefore, attempts to import a measure of order to this section of the law.

Common to the above classes, however, is that all make use of mechanisms whereby price may be *objectively* ascertainable. In order to fix a price, in other words, no further recourse need in principle be made to either or both of the parties; the essential price determinant in each case is an external standard. These classes of price ascertainment mechanism, therefore, may be collectively distinguished from that class of mechanism where ascertainment involves a *subjective* element. In the latter case, the ascertainment of price is made dependent upon some further decision by one or both of the parties.

In contrast to its somewhat unstructured approach to objective ascertainment mechanisms, South African law appears clear on the topic of subjective ascertainment mechanisms. Thus in the recent Appellate Division case of *H Merks & Co (Pty) Ltd v The B-M Group (Pty) Ltd and Another*, on the issue of the requirement of certainty of price, the court remarked as follows:

> The principle to be applied was stated by the present Chief Justice [then Corbett JA] in *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd*[281] at 574B-C, as follows:
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> 'It is a general rule of our law that there can be no valid contract of sale unless the parties have agreed, expressly or by implication, upon a purchase price. They may do so by fixing the amount of the price in their contract or they may agree upon some external standard by the application whereof it will be possible to determine the price without further reference to them. There can be no valid contract of sale if the parties have agreed that the price is to be fixed in the future by one of them ... This is part of the wider general principle that contractual obligations must be defined or ascertainable, not vague and uncertain'.
>
> Equally so, an agreement to later negotiate and agree on a price is not acceptable ... [282]

This *dictum* is illustrative, for besides confirming once more the general rule concerning the fixing of price (viz. that price must be certain or objectively ascertainable), the court identifies two clear instances which have been identified as a practical application of the latter rule. Indeed, the manner in which they are cited together with the general rule suggests that they take on the status of a corollary to the general rule; they appear to follow directly from that part of the rule that states that ascertainment entails reference to an external standard 'without further reference to [the parties]'.

These two instances are, of course, that the law will not regard as enforceable (i) an agreement between the parties to agree later on a price, and (ii) an agreement whereby one party is afforded the unilateral power to fix the price. As is clear in the above Appellate Division cases, and as will be indicated below, there appears a general consensus in South African law that such broadly subjective price ascertainment mechanisms may play no role in the ascertainment process.

2 6 2 Agreements to agree

2 6 2 1 The general approach in South African law, and the underlying rationale

In an agreement for the sale of goods, the parties may not necessarily immediately agree on a price, but may agree instead to agree on a price at some later stage. This has been consistently held not to result in an enforceable agreement.[283]

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281 1986 2 SA 555 (A).

282 1996 2 SA 225 (A) 233H-I.

283 *H Merks & Co (Pty) Ltd v The B-M Group (Pty) Ltd and Another*, above; *Lambons (Edms) Bpk v BMW (Suid-Afrika) (Edms) Bpk* 1997 4 SA 141 (SCA); *Titaco Projects (Pty) Ltd v AA Alloy Foundry (Pty) Ltd* 1996 3 SA 320 (W); *Aris Enterprises (Finance) (Pty) Ltd v Waterberg Koelkamers (Pty) Ltd* 1977 2 SA 425 (A); *Hattingh v Van Rensburg* 1964 1 SA 578 (T); *Shell SA (Pty) Ltd v Corbitt* 1986 4 SA 523 (C); *Cassimjee v Cassimjee* 1947 3 SA 701 (N). For the similar position with regard to agreements to agree with respect to rent, see also e.g. *South African Reserve Bank v Photocraft (Pty) Ltd* 1969 1 SA 610 (C); *Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk* 1993 1 SA 768 (A); *Wasmuth v Jacobs* 1987 3 SA 629 (SWA). See also the following modern commentators: Kerr *Sale* 34; Kerr *LAWSA XXIV* par 16; Van der Merwe et al *Contract* 62; Lubbe & Murray *Contract* 317-318; Belcher *Norman's Purchase* 65; Mostert et al *Koopkontrak* 11. For the Roman-Dutch origins of this rule, see e.g. Mostert et al, ibid., at 11 n 1.

The reason why such an agreement should not be considered enforceable has been indicated in a number of cases.

Thus firstly, in *Aris Enterprises (Finance) (Pty) Ltd v Waterberg Koelkamers (Pty) Ltd*,[284] an agreement conferred upon the director of a certain company an option to take over certain movables from another party for 'a nominal amount' which was to be fixed by agreement between the two parties. The Appellate Division, however, held the option to be of no force, observing that the two parties might never agree on such an amount; simply put, either party 'could not have been compelled to enter upon the discussions or to agree upon any amount'.[285] The court noted that it was crucial for the validity of a contract of sale (and likewise an option) that a price be fixed or determined by the parties' agreement.[286]

Similarly, in *Scheepers v Vermeulen*, the plaintiff had been granted an option to purchase certain immovable property for a specified sum but 'op terme wat tussen die partye ooreengekom mag word'.[287] Although the duty to negotiate and endeavour to agree *in casu* was not specifically with reference to price but to other terms, the court nonetheless makes an observation which is to the same extent applicable to an agreement to agree on price, namely, that such agreement affords each party an absolute discretion and the power 'om enige kontraksluiting wettiglik te vermy'.[288] By simply refusing to come to agreement, in other words, either party may at all times avoid entering into an enforceable contract. This same point is picked up in *Hattingh v Van Rensburg* where it was remarked that it is impossible for the law to affix any enforceable obligation to an agreement to agree because by the very terms of this agreement, either party could refuse to agree to anything to which the other party might agree.[289]

The problems concerning agreements to agree, would therefore appear to be the following.

Firstly, an agreement where parties leave over price for later agreement may simply indicate that they have not yet reached consensus upon this point, and that they do not intend to be bound until they do in fact reach agreement. There is simply no enforceable contract of sale in such cases, and were the courts to find otherwise, they would be acting contrary to the intention of the parties. In such a case, there is no agreement on the *price term*: they have (i) not agreed upon any immediate price, and (ii) nor have they agreed that price should be the

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284 Above.

285 434C.

286 That the court placed particular emphasis on this rule is clear if one considers that all that was held to be lacking in the agreement was agreement on a *nominal* amount. Price, therefore, could not have been regarded as overly significant by the parties. The court consequently admitted that it might appear at first blush unnecessarily technical or even fatuous to place so much emphasis on agreement with respect to price, but noted that the party relying on the agreement had specifically raised the agreement as a bar to an action for the recovery of the goods in question, and that accordingly, it was important that such an agreement be effective. Moreover, it appeared that for tax purposes, the parties intended some price to be set. See in general 433F-H.

287 1948 4 SA 884 (O) 887.

288 892.

289 1964 1 SA 578 (T), at 583A, citing *Williston on Contracts*. See also *Titaco Projects (Pty) Ltd v AA Alloy Foundry (Pty) Ltd*, above, at 338B ('... the established principle that an agreement to negotiate has no exigible content ...').

subject of later ascertainment (whether, for example, by reference to a particular price index, or, as in this case, by later, further, agreement between themselves). They have merely 'agreed' (or rather, acknowledged) that they still have to agree on the price term. An agreement to agree in such cases has therefore nothing to do with price ascertainment mechanisms. It concerns rather whether the parties have reached consensus on an *essentialé*, namely, the price term.

The second ostensible problem encountered in agreements to agree directly concerns their deliberate (i.e. consensual, in that this is the parties' *specific agreement* on a particular *essentialé* of their contract, viz. price) employment as price ascertainment mechanisms. This problem is that agreement on price cannot be guaranteed, and it is this point that has been demonstrated in the references to case law above. It might be argued (as it was indeed in *Scheepers v Vermeulen*[290]) that the parties have a *bona fide* duty to negotiate and attempt to reach agreement, but ultimately, the parties cannot be compelled to agree. No matter the pressure brought to bear on one or both of the parties, a party will, apparently, always be free to refuse to agree on a price, and consequently ensure that no contract arises. As Solomon J has remarked, '[t]here is nothing automatic in the formation of contracts between bargaining parties'.[291]

It should be clear, therefore, that at issue in agreements to agree is the question as to *whether* a price will be set. By its very dependence on the overlapping of two independent wills, a price - for all the good intentions of the parties - cannot be guaranteed. Such a contract, accordingly, is void for uncertainty: the law, aware that no consensus exists at present as to a precise price and with a view therefore as to whether price may nonetheless be said to be ascertainable, cannot likewise be certain that agreement will ever be reached on price in the future. In sum, the law cannot say whether a price is certain or ascertainable.

It should, however, be noted that an agreement to agree on price will not necessarily always result in the nullity of the supposed contract of sale in which this term is to be found. Parties may provide for an alternative price ascertainment mechanism in the event the parties fail to agree. Typically, parties will provide for recourse to a third party when, following a stipulated period of time, they fail to reach agreement on price (or the prestation in question, such as rental). Thus in *Chelsea West (Pty) Ltd and Another v Roodebloem Investments (Pty) Ltd and Another* a contract of lease provided that after an initial period, the rental payable and annual escalation would be determined by agreement between the parties, and failing such agreement, by an expert (whose appointment in turn was to be agreed upon by the parties, and failing such agreement, by the president of the local Institute of Estate Agents).[292] A similar agreement is to be found in *Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk*, where the court noted that where the agreement to negotiate a fresh rental stood alone, the contract would have been rendered unenforceable. However, the clause providing for determination by arbitration on the parties' failing to agree rendered the contract enforceable.[293] In these cases, of course, the agreement to agree is *itself* no more enforceable here than in the case of similar agreements in, for example, *Aris Enterprises* or *Scheepers v Vermeulen*. It is the contract,

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290 Above, at 892.
291 *OK Bazaars v Bloch* 1929 WLD 37 at 42, in the context of agreements to agree in general.
292 1994 1 SA 837 (C).
293 1993 1 SA 768 (A).

however, which is now enforceable, because the alternative default ascertainment mechanism ensures the *essentialé* in question, such as price, is indeed set, and this destroys any attack that may be made on the grounds of uncertainty.

Furthermore, parties may reach agreement on certain matters, but deliberately leave outstanding matters for later negotiation and agreement. In *CGEE Alsthom Equipments et Enterprises Electriques, South African Division v GKN Sankey (Pty) Ltd* the court confirmed that where consequently the parties failed to reach agreement on the outstanding matters, the initial agreement might nonetheless stand, provided that the parties intended a binding contract by the initial agreement,[294] and provided the initial agreement had an independent meaningful existence divorced from any terms left over for future agreement.[295] Similarly, in *First National Bank of SA Ltd v Transvaal Rugby Union and Another* a clause contained the express provision that following the conclusion of a contract, the parties were entitled to negotiate in good faith to affect further amendments as would be advantageous to both of them.[296] Where agreement, however, was not reached during the course of the negotiations, the parties would be bound by what was originally agreed upon.

2 6 2 2 Developments in English law

In s. 8(1) of the English Sale of Goods Act it is provided that the price in a contract of sale may be fixed by the contract, or may be left to be fixed in a manner agreed by the contract, or may be determined by the course of dealing between the parties. Section 8(2) thereafter provides that where the price is not determined as mentioned in s. 8(1), the buyer must pay a reasonable price.

It is a matter of some dispute whether an agreement to fix the price together at some later date - that is, an agreement to agree - falls within the ambit of s. 8(1) in that price in such a case has been 'left to be fixed in a manner agreed by the contract'. If this is indeed the case, then in the event of there being no later agreement on price, s. 8(2) provides for the substitution of a reasonable price.[297] This would go some way towards the alleviation of the fear as to *whether*, in agreements to agree, a price will indeed be set.

However, it would appear that s. 8 may not serve the purpose of saving an agreement that would otherwise be regarded as too uncertain to be enforced. Following the House of Lords decision in *May & Butcher v R*,[298] the general position would appear that an agreement to agree later on price will normally exclude any inference that the price should be a reasonable one, as would be the case on the application of s. 8(2): a price fixed by a judge is not the same as a price agreed upon by the parties.[299] In this decision, an agreement for the sale of war

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294 1987 1 SA 81 (A) 92.
295 On this requirement in particular, see *Titaco Projects (Pty) Ltd v AA Alloy Foundry (Pty) Ltd* 1996 3 SA 320 (W) 337, and *Kenilworth Palace Investments (Pty) Ltd and Another v Ingala and Another* 1984 2 SA 1 (C) 11.
296 1997 3 SA 851 (W) 856E-F.
297 See e.g. Adams & Atiyah *Sale of Goods* 28.
298 [1934] 2 KB 17n.
299 See Guest *Benjamin's Sale* § 2-045; Adams & Atiyah *Sale of Goods* 28; Treitel *Contract* 53.

surplus tentage provided that price would be agreed from time to time. The House of Lords held that the contract was incomplete, and confirmed, in its view, the long-established principle that an agreement to agree is no contract at all. If the agreement had been silent on this point, the Sale of Goods Act may well have provided for a reasonable price, or the court may have been willing to imply a reasonable price.[300] However, the parties *in casu* had shown this was not their intention by expressly providing for later agreement. Consequently, where the parties expressly provide for later agreement on price, the unenforceability of such an agreement cannot be saved by the default provisions of a reasonable price in terms of s. 8(2), or by way of implication.

It would appear, however, that English writers tend to restrict the application of *May & Butcher v R* to the circumstances of that case, and are prepared rather to take from this decision the important point that an agreement to leave important matters over for later agreement may indeed indicate that until there is such agreement, there is no contract.[301] For in holding that the contract was never completed, the House of Lords seems to indicate that, *in casu*, not only did the agreement to agree exclude any implication of a reasonable price, but that in so agreeing, they indicated that the contract would not be complete until there was in fact agreement on price; that is, they did not intend to be bound until agreement on price was reached.[302] Whether the intention to be bound only on agreement on price may indeed be deduced from the facts, is, it is submitted, questionable. Nonetheless, the principle raised cannot be overstated, and has already been referred to under **2 6 2 1**. Simultaneously, however, while *May & Butcher v R* is authority for the general principle that agreements to agree are unenforceable, this is not to say that *all* agreements to agree are deemed unenforceable. Thus it has been said that where the courts can clearly infer that the parties intend to be bound immediately, despite their agreement to agree later on price, the courts might be willing to find, nonetheless, for a binding contract;[303] before this could happen, the court would also have to satisfied that the contract was sufficiently complete so as to be enforced, but this would be so if the court allowed for the implication of a reasonable price (or the implication of some other term by the standard of reasonableness).[304] This is logical as the intention to be bound immediately, whilst nonetheless agreeing that price would be determined by later agreement, indicates that the parties in such a case intend *price ascertainment*, and have not left over price for agreement later because they have failed thus far to reach consensus on this essential term. They have in fact reached consensus on this *essentialé*, the price term, viz. that the actual price will be agreed upon later. Accordingly, they intend to be bound immediately by the terms of their agreement, *including* this price term. It is suggested thus that a decision such as *May & Butcher v R* does not make the clear distinction between an agreement to agree later on price *because* there is no agreement on the price term, and an agreement to agree later on price *which is in fact the content of the agreement on the price term.*

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300 See in particular the views of Viscount Dunedin at 21n, and Lord Warrington of Clyffe at 22n.
301 See here Treitel *Contract* 53; Adams & Atiyah *Sale of Goods* 28.
302 See especially Lord Buckmaster at 20n.
303 Treitel *Contract* 53-54; Adams & Atiyah *Sale of Goods* 29.
304 Treitel, ibid., at 54; Adams & Atiyah, ibid., at 30; and the reference, by analogy, to *Pagnan SpA v Feed Products* [1987] Lloyd's Rep 601, at 619.

The willingness of the English courts to find for a binding contract appears to be particularly so where the parties have agreed on a sale of goods at prices to be agreed upon in the future, and the agreement is *partly performed or executed* (e.g. the goods are already delivered and accepted);[305] the courts here may be willing to imply a reasonable price, where necessary (i.e. where agreement is in fact not reached), so as to make the agreement enforceable. This would be so on the ground that the courts will endeavour to uphold contracts intended to be binding by the parties, and presumably, because the partially executed nature of the agreement indicates this intention to be bound immediately. Naturally too, where the parties agree to agree later on price, but provide for arbitration or determination by experts in the absence of agreement, there should be no obstacle to the enforcement of the contract of sale. Thus Treitel identifies *Foley v Classique Coaches Ltd*[306] as an example of a more generous (with respect to the intention of the parties) judicial attitude, though perhaps this case more obviously indicates the approach of the English judiciary to take each case its own merits.[307] *In casu*, the owner of a petrol station sold land to a motor-coach business on condition that it purchase its petrol exclusively from him 'at a price to be agreed by the parties from time to time'. The Court of Appeal held that, in the absence of such later agreement, the law would imply that a reasonable price was to be paid, and the agreement was consequently binding. The case can be distinguished from *May & Butcher v R* on a number of grounds including that the agreement was believed to be immediately binding by the parties and had been acted thereupon, and that the contract contained an arbitration clause under which a reasonable price could be determined in the event of disagreement.

The position in English law is also that in principle, as in the case of an agreement to agree, an agreement to negotiate is too uncertain to be enforceable,[308] and it appears that in *Walford v Miles*,[309] the House of Lords was unpersuaded that such an agreement was any more enforceable by finding for a duty to negotiate *in good faith*. A duty to negotiate in good faith was found to be repugnant to the adversarial positions of parties involved in negotiations.[310] However, there are indications in this decision that the court might adopt a more lenient approach to any duty to use best endeavours to reach agreement.[311] The distinction between a duty to negotiate in good faith and a duty to use one's best endeavours, however, is not clear.[312] Treitel suggests it might lie in that an agreement to use best endeavours refers to the *machinery* of negotiation, while one to negotiate in good faith refers to its *substance*.[313] Thus according to Treitel, the former might, for example, oblige a party to make himself available

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305 Guest *Benjamin's Sale* § 2-045; Adams & Atiyah, ibid., at 29.
306 [1934] 2 KB 1.
307 Treitel *Contract* 53; McKendrick *Contract* 52.
308 See the discussion in Treitel, ibid., at 52-54.
309 [1992] 2 AC 128.
310 138.
311 Ibid.
312 See also McKendrick *Contract* 51, and the decision in *Queensland Electricity Generating Board v New Hope Collieries Pty Ltd* [1989] 1 Lloyd's Rep 205, where the Privy Council recognised an agreement whereby the parties 'undertook implied *primary* obligations to make reasonable endeavours to agree' (my emphasis) on certain terms of supply, including a new price setting structure, on completion of an initial period of five years (during which period the original price setting structure applied). The contract in question did, however, provide for a comprehensive arbitration clause, as well as broad criteria for the setting of the new price structure.
313 Treitel *Contract* 58.

for negotiations, or at least not to prevent the other party from communicating with him (e.g. by deliberately failing to pick up his telephone). An agreement to negotiate in good faith, on the other hand, might oblige a party not to take up unreasonable or exorbitant positions during negotiations, and it is this difficulty in giving a precise content to this obligation, whilst acknowledging this party's freedom to pursue his own interests, that may make this agreement unenforceable. In any event, it is clear this is not the last word on the matter.

2 6 3 Unilateral power to determine price

A party to a contract may not be afforded the power to fix the price by him or herself.[314] Where this is indeed agreed upon as the price term or stipulation in a contract of sale, such a contract is not enforceable. This is a rule as well recognised as that rendering as unenforceable contracts containing agreements between parties to agree later on price.[315] Moreover, it a rule which has been expressly stated by the Appellate Division to follow from the wider general

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314 *Lambons (Edms) Bpk v BMW (Suid-Afrika) (Edms) Bpk* 1997 4 SA 141 (SCA) 158F-159A; *H Merks & Co (Pty) Ltd v The B-M Group (Pty) Ltd and Another* 1996 2 SA 225 (A); *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 2 SA 555 (A); *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* 1964 1 SA 669 (W); *Shell SA (Pty) Ltd v Corbitt and Another* 1986 4 SA 523 (C); *Stead v Conradie* 1995 2 SA 111 (A) 123A-I; *Kriel v Hochstetter House (Edms) Bpk* 1988 1 SA 220 (T); *Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd* 1991 1 SA 508 (A) 514G-H; *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd* 1993 1 SA 179 (A) 182G; *Aris Enterprises (Finance) (Pty) Ltd v Waterberg Koelkamers (Pty) Ltd* 1977 2 SA 425 (A) 434E; *Reymond v Abdulnabi* 1985 3 SA 348 (W) 349G-J; *Cassimjee v Cassimjee* 1947 3 SA 701 (N) 706; *Deary v Deputy Commissioner of Inland Revenue* 1920 CPD 541, 548; *Hattingh v Van Rensburg* 1964 1 SA 578 (T). See also e.g. Mostert et al *Koopkontrak* 11; Coaker & Zeffertt *Mercantile Law* 188; Hackwill *Mackeurtan's Sale* 16; Belcher *Norman's Purchase* 66; O'Donovan *Mackeurtan's Sale* 45; Kerr *Sale* 54; Christie *Contract* 110; Joubert *Contract* 180.

315 It is in a judgement such as *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* 1964 1 SA 669 (W), perhaps the *locus classicus* on *pretium certum* in South African law, that one is able to perceive the degree to which the rule against price-fixing is regarded as established, perhaps even unquestioned. The court itself, of course, had said as much early in the judgement ('[i]n our law ... there can be no valid contract of sale if the parties have agreed that the price is to be fixed by one of them or his nominee': 670E). Perhaps more indicative, however, is the carefulness of counsel for the plaintiff in avoiding taking up on the suggestion, made in fact by the court, that the adjustment clauses (Parts II and IV) amounted in effect to a contractual discretion in favour of the plaintiff. See here the discussion of the case at 1 2 4. Thus at 673H the court suggests that three different readings may be given to the clause providing for increases in manufacturing costs. The third possibility mentioned at 673H amounts to a contractual discretion in favour of the plaintiff. At 674A it is clear that while counsel was prepared to argue for the first two possibilities (which did not amount to contractual discretions), he at no stage attempted to argue for the third possibility, even though the court stated that 'the words of the document seem to me to be consistent with all three possibilities'. See also at 675H where again counsel raises the possibility that the provisions in Parts III and IV amount effectively to a contractual discretion 'at the option of the plaintiff or in one instance, at any rate, of the defendant' to vary the price. Counsel then neatly sidesteps the dangers inherent in such a construction by contending that the discretion was never exercised, thus leaving behind an unchanged - and fixed - original price.

principle that contractual obligations must be defined or ascertainable, and not vague and uncertain.[316]

In **2 2 2** it was suggested that price, if not immediately certain, must be *objectively* ascertainable so as to remove price beyond the range of the clash of will of the parties. Equally, this is shown in **2 6 2 1** to be the reason for the non-recognition in our law of agreements to agree. Where a final quantification of price requires the further agreement of the parties, there is uncertainty as to *whether* a price will in fact be agreed upon. In the case of a party afforded the power to fix the price, however, there would not appear to be the equal danger of price being thrust back into the arena of the clash of wills. Here the party afforded such a power fixes the price in his own discretion; he or she is not required to reach agreement with his or her co-contractant. Indeed, in *Odendaalsrust Municipality v New Nigel Estate Gold Mining Co Ltd*,[317] the remarks of Van den Heever J that the matter had been placed beyond the reach of consensus pertained particularly to a very similar position to that at issue here. In this case, a party had been afforded a similar unilateral power, not with respect to price, but with regard to another *essentialé*, viz. the identification of the *merx*. In as much as the party in *Odendaalsrust Municipality* could, by the exercising of his unilateral power, render the identification of the *merx* certain, so likewise may a party achieve the same in the setting of a certain, fixed price.

It is submitted, therefore, that the ratio behind the rejection of a price-setting power by a party to a contract of sale may be found elsewhere. It is may well be, for instance, that the refusal by our courts to allow a power to be given one party to determine the price might be traced back to a fear of abuse of this power by one contractant to the prejudice of the other. Such a power, conceivably, might allow one party to fix a price greatly disadvantageous to the other, and hold that party to the bargain. Consequently, the uncertainty here may be not as to whether there will be eventual determination of price, but with regard to *what* price will in fact be set. This shall be examined in greater detail later.[318]

2 6 4 The scope of the prohibition on recourse to the parties

The courts and modern South African commentators, when referring to objective ascertainment, frequently state that no recourse should made to the parties.[319] As indicated in **2 2**, this prohibition can be read as the key characteristic of objective ascertainment; where recourse must be made in the sense of requiring the further agreement of the parties, price can no longer be regarded as objectively ascertainable, as price is no longer removed from the clash of will of the parties. Moreover, in the light of **2 6 2** and **2 6 3** above, the requirement that a price must be ascertainable without further recourse to the parties may be held to pertain specifically to further two situations, viz. (i) in a so-called agreement to agree later on price,

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316 *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 2 SA 555 (A) 574C-D, cited at 2 6 1 above; also reaffirmed more recently in *H Merks & Co (Pty) Ltd v The B-M Group (Pty) Ltd and Another* 1996 2 SA 225 (A) 233I and *Lambons (Edms) Bpk v BMW (Suid-Afrika) (Edms) Bpk* 1997 4 SA 141 (SCA) 158G.

317 1948 2 SA 656 (O) 665, discussed at 2 2 2 above.

318 See in particular 6 4 below.

319 See the discussion at 2 2 above.

and (ii), where price is fixed by one of the parties. Aside from certain exceptions, such as where the parties agree to agree later on price but provide for its ascertainment by a third party in the event of their disagreement, the prohibition may be regarded as a general rule. Furthermore, recourse will also not be allowed to the evidence of the parties where this is not permitted in terms of the parole evidence rule.[320]

This prohibition, however, should not be taken out of context. In particular, it should not be used to hold that in the objective ascertainment of price, no reference may be made to the parties *at all*, if by this it is meant that a court may not make reference to the evidence given by parties. In *Delmas Milling Co Ltd v Du Plessis*, the Appellate Division adopted the view that extrinsic evidence should be used 'as conservatively as possible', and that words should first receive a 'linguistic treatment' before evidence of surrounding circumstances and what passed between the parties be permitted.[321] As noted by Van der Merwe et al, this approach has been criticised for its inflexibility.[322] In any event, it is clear that even in *Delmas Milling Co Ltd v Du Plessis*, the court recognised that in the event of uncertainty which the evidence of other surrounding circumstances cannot resolve, the evidence of the parties on what passed between them is permissible.[323] Moreover, this same case held that extrinsic evidence of an identificatory nature is always admissible as it is not really used for interpretation but 'to apply the contract to the facts'.[324] Thus evidence by the parties with regard to the identification of the 'bank overdraft rate' in *Engelbrecht v Nel*, for instance, would have been admissible if the court had persevered further in any attempt to establish the relevant interest rate.[325] The point, however, is that such evidence has to go further than the mere affirmation, in that party's view, of the consensus reached between the parties. This has been confirmed recently in *Comcorp (Pty) Ltd v Quipmor CC*, where at issue was whether a certain document subject to a copyright was identifiable with sufficient certainty in a document of assignment.[326] The court held that while evidence from the assignor, for instance, on the consensus between the parties would not be admissible, the assignor could identify the particular document in question or identify it as the only one that had been drafted during a particular time.[327] Thus where it is clear that the evidence of parties will be of little weight would be in cases where, on the supposed consensus reached between the parties, it is much the case of one party's evidence against the other. Thus in *Coronel v Kaufman*, a case which concerned a written option to purchase property, an offer was made for the option on the ground that 'the price will not stand in your way'.[328] This offer had been duly accepted. The court found that while a price may be determinable by the application of the maxim *id certum est quod certum reddi potest*, the phrase in question referred to nothing by which that price could be made certain. For it held that in the case before it '[t]he price can only be determined by the evidence of the parties and if they dispute the price, if the one says it was 8s. a morgen

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320 See 1 1 5 above, and e.g. *Clements v Simpson* 1971 3 SA 1 (A) at 7F.
321 1955 3 SA 447 (A) 454-455.
322 Van der Merwe et al *Contract* 224, and the references therein.
323 455.
324 454.
325 1991 2 SA 549 (W), discussed at 2 3 1 above.
326 1998 2 SA 599 (D).
327 603G-604A.
328 1920 TPD 207 at 209.

and the other says it was 30s. 6d. a morgen it would be impossible to tell what the exact contract was ...'.[329]

In sum, it is suggested that the position is most accurately set out by Van der Merwe et al as follows:

> Where the parties intend to make the consequences of their agreement objectively ascertainable, reference may be had only to the standard set in the agreement, and a further agreement between the parties or the exercising of a unilateral discretion by one of them must not be necessary. So, for example, certainty is attained where the parties incorporate into their contract details contained in a specified document, or where they agree upon an objective standard for determining performance ... [and] [t]he determination of the performance may be entrusted to a third party ...[330]

Here the somewhat misleading prohibition on further recourse to the parties is avoided. Moreover, the writers indicate that by objective price ascertainment, it not envisaged that the parties may agree to agree later on a final setting of price, or that this may be done by one party alone.

2 7 Certainty at issue in various contexts: a synopsis

Having completed an examination of the approach taken by South African courts to the ascertainment of price, it is submitted that in the question of *pretium certum* arises in the following three ways.[331]

2 7 1 Vagueness

Firstly, an apparent contract of sale may include a price term which is too vague to be enforced by the courts.[332] The price term may, for example, be expressed in unintelligible language or key words may appear to have been left out of the term. This is the problem of certainty in its most *literal* sense, and possibly arises in primarily two situations.

(i) In the first place, vagueness might simply reflect the fact that the parties never reached consensus on this term, and that they appreciated this. Consequently as they never agreed on price, they were unable to include a *certain* term on price in their agreement. There may, of course, be different reasons for this. The parties may genuinely wish to come to agreement on price immediately, but may fail to achieve this. In such a case, it is perhaps more likely that

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329 Ibid.

330 *Contract* 163.

331 The division below is not taken from any source in particular. However, it has been influenced by the distinction in English law made by writers such as Treitel (*The Law of Contract* 47-58) and McKendrick (*Contract Law* 52-53) between vagueness and incompleteness, and the systematic approach of Furmston (*Cheshire, Fifoot & Furmston's Law of Contract* 44-47). The primary South African influence has been Christie (*The Law of Contract in South Africa* 104-113) who broadly follows the approach in *Levenstein v Levenstein* 1955 3 SA 615 (SR) 619 where Quénet J classifies 'void for vagueness' cases into four classes.

332 On 'vagueness' see in general Treitel, ibid., at 47; McKendrick, ibid., at 52; Furmston, ibid., at 47; Guest *Chitty on Contracts* § 123; Christie, ibid., at 111-113.

no term (on price) whatsoever will be incorporated into the agreement, rather than (as contemplated above) the specific inclusion of a price term which is too vaguely defined to be enforced. Of course it may unintentionally 'slip in' or be included as an exercise in self-deception. Possibly more likely in such cases, however, is where the term on price was agreed upon by the parties while in the course of negotiations, which they intended to continue, and the term on price reflects the incompleteness of the negotiations; in this case the price term is thus intentionally incomplete or vague, pending eventual agreement.[333] Agreement may consequently never be reached, and the 'contract', with terms incomplete, may nonetheless find itself being tested before the court for enforceability. In this case, on application of the test for certainty, the courts should find there to be no agreement. Where however the court finds the price term to be enforceable, it finds for agreement that is not to be found; it creates a price. If it consequently holds the contract as enforceable on this (new) term, it makes the contract for the parties. The question here is what price *has* been fixed by the parties, and the answer must be: none.

(ii) In the second place, the parties may *agree* on a price term which is too vague to be enforced by the courts. In such a case, the parties may believe that they have completed their negotiations; in their view, they have agreed upon price. However, they have expressed their agreement in such language or form that it cannot be said with certainty what they have agreed upon or what their agreement means.[334] Usually this will occur where parties attempt to make price ascertainable. Thus parties may refer to some standard or formula by which, apparently, price is to be ascertained. The form or language in which such reference is made, however, may be so vague that the court is unable to attribute any reasonable meaning to it, and the court will then hold that no certain price has been fixed by the parties.

This, of course, should not be done lightly; the courts, before holding that there is no price, must take all factors into consideration, including possible tacit terms, *naturalia*, custom and all surrounding circumstances.[335] This is especially so in the light of the principle that where the parties intend to enter into binding contractual relations, effect should be given as far as possible to this intention, and the court should not be seen to place legal technicalities in the path of the achievement of this intention.[336] Where however the court, despite diligent attempts to ascertain price, is unable to resolve the uncertainty, the agreement must be held unenforceable on the ground that it cannot be said that the parties were in fact *ad idem* on the aspect of price. This must be the conclusion even where the parties believe that they were in

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333 This is approximately the case of, in *Levenstein v Levenstein*, Quénet J's third class of vagueness, viz. 'continuing negotiations broken off *in medio*'. As to this, see Christie *Contract* 105 and 36-38. Here, however, it should be noted that while *this* term (i.e. the price term) in particular may be unenforceable, agreement on *other* aspects may have already been reached to the extent that *a* contract may be said to enforceable; see e.g. *CGEE Alsthom Equipments et Enterprises Electriques, South African Division v GKN Sankey (Pty) Ltd* 1987 1 SA 81 (A) and *Kenilworth Palace Investments (Pty) Ltd and Another v Ingala and Another* 1984 2 SA 1 (C).

334 E.g. Furmston *Contract* 47.

335 See 1 1 5 above. See also Treitel *Contract* 47-48. Here it is said that in English law, vagueness may be resolved in certain circumstances by the courts by (i) reference to custom, (ii) the implication of reasonableness, (iii) a duty on one party to resolve vagueness, and (iv), where possible, the ignoring of meaningless and vague phrases where such phrases are severable from the main contract without effecting the latter's vitiation. This appears likewise in Guest *Chitty on Contracts* § 124-128.

336 See above.

agreement: the courts will not make a bargain for the parties if, although they thought they were contracting, they nonetheless failed to reach an agreement on an important term of their proposed bargain.[337] The question in this case, therefore, is again what price *has* been fixed by the parties. The answer is, once more, none - even though, it might be added, the parties believed that they had reached agreement.

Whilst not entirely on the point of the ascertainment of price, the facts of *Titaco Projects (Pty) Ltd v AA Alloy Foundry (Pty) Ltd* express this scenario well.[338] *In casu*, while it was common cause between the parties (an engineering company and its subcontractor) that an agreement in 'principle' had been reached with regard to the manufacture of certain brass electrical shoes by the subcontractor, the court incisively demonstrates that the specification of the copper to be used in the manufacture of these shoes had never been agreed upon.[339] Thus even if the parties had thought they had reached agreement, and had expressed themselves as being in agreement on this term, the fact could not be hidden that there had, in fact, been no agreement.

There is also, however, a second ground upon which to found unenforceability. This ground would be *not* to argue that the parties were never *ad idem*, but that this agreement is simply not ascertainable by the court: agreement lies in the mind of the contractants, and who can know this mind?[340] Thus for example, a written contract may include a specific price, but in illegible handwriting. The court is unable to resolve the uncertainty in any way, even following recourse to extrinsic circumstances. It would surely be going to far to argue, to paraphrase *Levenstein v Levenstein*,[341] that the vagueness in this case justifies the implication that the parties were never *ad idem.* Clearly they were *ad idem*. Thus the contract of the parties fails here not because they were never at consensus, but that their agreement simply fails the test of certainty: agreement must be of *such ascertainable quality* as to be enforceable by the courts.[342]

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337 *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* 1964 1 SA 669 (W) 676B; *Titaco Projects (Pty) Ltd v AA Alloy Foundry (Pty) Ltd* 1996 3 SA 320 (W) 338D;

338 1996 3 SA 320 (W).

339 331F-H.

340 '[T]he intent of a man cannot be tried, for the Devil himself knows not the intent of a man': Chief Justice Brian, cited in Van der Merwe *Die Duiwel* 13.

341 1955 3 SA 615 (SR) 619.

342 In such as case, there may well be an argument for the recognition of the enforceability by the courts test as a substantive test in itself, that is, a test *not* needing to find its justification in, for example, the theory of individual autonomy, but grounded purely in pragmatism. The contract fails not for reasons based in theory and principle but (if not exclusively then primarily) for a reason based on practicality: the contract is unenforceable simply because its content is unenforceable by the court. See 1 1 5 above, and the citation from *Scammell v Ouston* [1941] AC 251. On the other hand, to state that the consensus reached was not of sufficiently ascertainable quality might simply be another way of saying that the parties were never *ad idem* - that is, possessing the *level or degree* of consensus required by the law. From this it would seem to follow that within this level or degree of consensus required there must be some minimum form of *expression* of the agreement i.e. the consensus recognised by the law must in some way be able to be recognised *outside* of the minds of the parties. This would then be reflected in the requirement that price must be *objectively* ascertainable. Thus if price is not objectively ascertainable, then there cannot be said to be consensus as recognised by the law.

In sum, both (i) and (ii) entail a contract where, as described by Quénet J in *Levenstein v Levenstein*, 'the vague and uncertain language justifies the implication that the parties were never *ad idem*'.[343] The distinction between (i) and (ii) is not overly significant. In (i) the parties, if honest, would probably be heard to say that they knew they were not *ad idem*. In (ii) the parties may think themselves to be *ad idem*, but in fact are not; or, at least, have not attained a quality of consensus recognised by the positive law.

2 7 2 Incompletion

The second situation where certainty may be said to be at issue probably accounts for most cases where a contract of sale has been declared void for want of certainty of price. This situation also pertains primarily where the parties choose not to make price immediately certain but provide for its later ascertainment, whether by way of reference to third parties, to external standards such as market prices, or to the further agreement of the parties themselves. Likewise, the contract of the parties fails here not because the parties were never at consensus, but that their agreement was not of *such ascertainable quality* as to be enforceable by the courts. In particular, the agreement between the parties must be *objectively* ascertainable.

This situation may be distinguished from that pertaining to the first situation mentioned above, viz. vagueness. In the situation *in casu*, the manner in which ascertainment is to take place is not unclear; the contract may make very clear to what external standard or formula or third person reference is to be had. The provision providing for ascertainment is not so vague that the courts are unable to place a meaning on it. Rather, at issue is that once more, in some way during the course of the ascertainment process, the fixing of price becomes dependant on the *further* agreement of the parties.[344] In this way, it is 'incomplete'. Thus in cases such as *Reymond v Abdulnabi* and *Heyman's Estate v Featherstone* it was clearly agreed between the parties that price was to be fixed by third parties.[345] In both cases, however, before the third party could in fact fix a price, the respective courts held that the further agreement of the parties would be required: in the former case, the precise identity of the third party had still to be established; in the latter, the originally appointed third party was unable to act and the parties were obliged to agree upon a replacement. Likewise, in *Engelbrecht v Nel* the reference to 'bank overdraft rate' was regarded by the court as an insufficiently certain reference to the interest to be paid, and that recourse would be required to be made to the parties to establish what was meant by this phrase.[346] In all these cases, price is, apparently, still not placed beyond the reach of the clash of consensus; the *further* agreement of the parties is needed and this cannot be guaranteed. This is also patently clear in the traditional case of an agreement to agree later on price, such as *Scheepers v Vermeulen*.[347] Hence it is not certain that a price will ever be fixed. In this sense price is said to be uncertain. Accordingly, the question here is *whether* a price will be fixed, and the answer is: we cannot be sure.

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343 1955 3 SA 615 (SR) 619. This is the second class of contract void for vagueness described by Quénet J. See again Christie *Contract* 111-113.
344 In general, Treitel *Contract* 50 ff, and the discussion at 2 2 above.
345 1985 3 SA 348 (W); 1930 EDL 105.
346 1991 2 SA 549 (W).
347 1948 4 SA 884 (O).

It may, of course, be difficult to determine whether a particular price term should be regarded as 'vague' (in the sense of point (ii) in **2 7 1** above) or 'incomplete'. In *Engelbrecht v Nel*, for example, the court suggests that further evidence would be required so as to establish what was *meant* by the phrase 'bank overdraft rate'. This suggests that the phrase is vague. On the other hand, this could be regarded as a case of the parties reaching agreement, but not of such ascertainable quality as to be recognised by the law i.e. in the court's eyes, the interest rate was not objectively ascertainable. As suggested above, most cases of apparent uncertainty of price can probably be explained in the latter manner; there are probably few cases where the parties think they are agreeing on price and draw up a price term to this effect, only to discover that the language or formula they used in the price term is so ambiguous and vague that even upon the court taking recourse to their and other evidence, no price can be arrived at. On the other hand, it is probably often the case that parties specifically agree on a price term, not realising that, in the court's eyes, the agreement they reach is not adequately (i.e. objectively) ascertainable. Thus most cases of prices in contracts which fail the rule of *pretium certum* are 'incomplete' and not 'vague'.

2 7 3 Uncertainty inherent in discretions

Finally, there is a third situation in which certainty of price is apparently at issue. This occurs once again where parties attempt to provide for the later ascertainment of price, and in particular, by allowing the price to be determined by someone in his or her discretion. This person may be a party to the contract,[348] or a third party. Here, again, it may be that certainty in its literal sense is not applicable; the reference to the third party, or to one of the parties to the contract, may not be vague in the least. To a similar extent to **2 7 2** above, a contract in such cases might also be 'incomplete': the reference to a third party may fail or the buyer or seller, appointed to fix price in his or her discretion, might fail to do so and consequently, barring the intervention of the courts, the further agreement of the parties might be necessary in order for a price to be set. Rather, the distinguishing feature of such cases is simply that it involves the exercise of a *subjective* discretion, and *before* this discretion is exercised, the law cannot know what price will be set. In this sense, price is uncertain; consequently, the fundamental question in this case might be what price *will* be fixed. Accordingly, the fear present in these circumstances is one regarding a possible abuse of this power by that party. This fear materialises in the recognition that a manifestly unfair price may be set by a third

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348 In general, Furmston *Contract* 46, and the discussion at 2 6 3 above. This situation also corresponds somewhat with Quénet J's first class of contract void for vagueness, viz. where 'the so-called contract is not enforceable because the promise is 'dependent on a condition which in fact reserves an unlimited option to the promissor''; *Levenstein v Levenstein* 1955 3 SA 615 (SR) 619. This covers the situation pertaining above, i.e. where a party is afforded a power to fix the price; see here Christie *Contract* 110 who does indeed discuss the latter situation under Quénet J's first class. However, the statement by Quénet J, above, is also wide enough to cover the so-called *si voluero* condition, and, indeed, may have been intended primarily to address the latter situation. This might appear particularly from the remark of Quénet J that in the first class (of contract void for vagueness) there is uncertainty as to whether the promissor will ever acknowledge the existence of an obligation. As to the *si voluero*, see 6 4 1 below and particularly Lubbe 1989 *TSAR* 159.

party, such as in *Gillig v Sonnenberg*.[349] It also materialises in the apparently well established rule that a party to a contract may not fix the price.

2 8 Conclusion

This chapter has demonstrated the approach of our courts to the objective ascertainment of price. In particular, it has demonstrated *when* courts regard a price as being *objectively* ascertainable.

At the beginning of this chapter, it was suggested that the primary reason for requiring a price to be, if not immediately certain, then objectively ascertainable, was that in this way price would be placed beyond the reach of the clash of consensus. The moment that price is no longer objectively ascertainable, then *if* a price is to be set, recourse must once more be made to the parties, and a further agreement obtained from them. One cannot, however, be sure that a further agreement will result. Accordingly, a contract of sale containing a price which is not objectively ascertainable is 'incomplete': it is not certain whether there is a price.

Thus the simple definition of a price which is objectively ascertainable is one in which price can be determined without, ultimately, being dependent on a further agreement between the parties. What this chapter has demonstrated is that the extent to which a court will go in attempting to ascertain price without conceding that ascertainment is dependent on further party agreement, may differ from case to case. Thus a court which is careful not to be seen to make the contract for the parties may not go far in such an attempt, fearing that to go further will result in it implying terms never intended by the parties. On the other hand, a court which recognises that the parties intend to be bound by the contract, and recognises that, in terms of the principle of autonomy, effect should be given to the intentions of the parties wherever possible, may be inclined to go further. In this respect, the path a court chooses to take may have important repercussions. As seen in a case such as *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd*,[350] a price may, at first glance, not appear objectively ascertainable. A failure to appreciate, however, that, in the view of the contractants, price is fully exigible and that, with diligence, one could find for an enforceable price, may lead to contractants escaping the consequences of their liability. Case law is replete with instances of parties raising defences on the basis of the nebulous ground of uncertainty of price, and the consequent invalidity of the contract upon which they are being sued; these are often indicated during the discussion in this chapter.

Accordingly, Hawthorne would appear to be right: parties who make use of a method which provides for the later ascertainment of price, and who do not elect to make price certain form outset, run the risk of their contracts being declared void for uncertainty. This is a result of our casuistic system; each case is treated on its own merits, and one court's view of objective ascertainment may differ from another's. And where there might appear to be an appropriate factual precedent, the court will simply distinguish. All things considered, it does seem to be a fairly unpredictable situation.

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349 1953 4 SA 675 (T).

350 1964 1 SA 669 (W), discussed at 1 2 4 above.

This then leads us to a rather obvious question. If the business of objective ascertainment is such a tricky one, why do the parties to a sale not content themselves with an immediately certain price? If the risk of failure in objective ascertainment is such a high one, why do they persevere? This question has thus far received little attention in this study. But this question is hurried on by another, and this one then must surely be as follows. If it can be established *why* parties to a sale insist upon choosing to provide for the later ascertainment of price, should, and does, this motivation on the part of the parties play any role in the courts' judgement as to whether the method chosen results in the sufficient certainty of price? In answering this question, the focus of this study inevitably moves from an examination of *when* price may be said to be objectively ascertainable, to an examination of, perhaps, *when it should be*. Accordingly, we turn our attention to the concept of *contractual adaptation*.

CHAPTER THREE: CONTRACTUAL ADAPTATION

3 1 Introduction

A key paradigm upon which classical contract theory is based is that of the discrete contract.[351] A relatively simple definition of a discrete transaction is that of a contract where no duties exist between the parties prior to their contracting and where all the duties the two parties accrue in terms of the contract are determined at the time of contracting.[352] Goldberg highlights the elegance and simplicity of the discrete transaction as follows:

> Prior to their contract, Smith has no duty to Brown; at the time they enter their agreement, in a single joint exercise of their free choice, they determine their respective duties to each other for the duration of the agreement; completion of the promised performance terminates that party's obligations ...[353]

In practice, a discrete transaction envisages a contract concluded between two strangers who meet in a market place and bargain for the exchange of a homogeneous commodity before disappearing, the deal done.[354] Thus what a discrete transaction essentially describes is that type of contract which classical contract law regarded as *typical*, that is, as the model of contract towards which the rules of classical contract law were orientated.[355]

The discrete transaction in turn came to be used as a cardinal feature of early economics and law studies, and in particular, in what Veljanovski and Williamson have described as the market-based approach to the economic analysis of law.[356] Thus Richard Posner and Anthony Kronman, for example, use models of contract which are essentially discrete.[357] In more recent years, however, scholars have shifted attention to models of contract which do not fit snugly within the discrete transaction paradigm. Thus the so-called relational model has

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351 See e.g. Eisenberg *Relational Contracts* 296; McKendrick *Regulation* 308.

352 Macneil *Economic Analysis* 61; Williamson *Contract Analysis* 40, 42-43. See also McKendrick *Regulation* who at 308-309 usefully summarises the 'ingredients' of a discrete transaction, identified by Macneil, as comprising the following: (i) a clearly defined beginning, duration and termination; (ii) clear and precise definition of the subject matter of the transaction, its quantity and the price; (iii) the substance of the exchange is planned at the moment of formation of the contract; (iv) the benefits and burdens of the contract are clearly assigned at the moment of formation; (v) there is little emphasis upon interdependence, future co-operation and solidarity between the parties; (vi) the personal relationship created by the contract is extremely limited, and (vii) the contract is created by the single exercise of bilateral power.

353 Victor Goldberg, cited by Macneil *Contractual Relations* 61.

354 See e.g. again Eisenberg *Relational Contracts* 296.

355 Ibid.

356 Williamson *Contract Analysis* 40. These writers specifically identify Richard Posner (*Economic Analysis*) with the market-based approach.

357 Williamson *Contract Analysis* 40, 42. See here Posner *Economic Analysis* and Kronman & Posner *Economics*.

been developed by a number of scholars to describe contractual relationships which cannot be described as 'sharp in by clear agreement, sharp out by clear performance'.[358]

In this study, it is not necessary that the relational model is examined in detail; in any event, both Eisenberg and McKendrick have in two recent and separate articles summarised the contributions of various scholars to the development of this model.[359] Accordingly, a few observations will suffice. Thus the first is that some difficulty has been encountered in providing an adequate definition of the relational model,[360] and it is this difficulty, in fact, which reveals to us to the first feature characterising this model. This is that the model, as often as not, is defined negatively; that is, by contrasting it directly with the discrete model and effectively stating it to be what it is not.[361] Thus Macneil simply lists the features of a discrete transaction which in turn he says are not present in a relational contract.[362] Bell, on the other hand, refers to a long-term contractual relationship which, he says, 'may be contrasted with a discrete, one-off contract, where performance is more or less instantaneous, and there need be no prior or subsequent dealings between the parties'.[363]

The second particularly characteristic feature is that, invariably, a relational contract encompasses some form of contractual *relationship* between the parties. This should not be taken to mean that relational contracts are inevitably *long-term*; while they often are, 'temporal extension *per se* is not the defining characteristic' of a relational contract.[364] Rather, it means that the relationship extends beyond the single moment of exchange which characterises the discrete transaction, however long or short this may in fact be. Eisenberg, accordingly, adopts the straightforward definition that a relational contract is a contract which involves not merely an exchange, but a relationship, between the contracting parties (and that, conversely, a discrete contract is all exchange and no relationship). He then goes to point out that, on this definition (and especially if one bears in mind that the relevant relationship need *not* be long-term), most contracts are in fact relational, and not discrete.[365] This is clearly so if one considers that a contract need extend only beyond pure exchange by, for instance, the simple agreement between the purchaser and seller that delivery should take place the next day, and the contract already begins to take on the vestiges of the relational. Moreover, a contract which traditionally would be characterised as discrete, such as the buying of foodstuffs in a supermarket, may in fact be shown to be relational when one shows that the buyer returns regularly to the same supermarket.[366] Important for present purposes, therefore, is that this shift in focus has led to the general observation that the *typical* contract encountered in contract law does not necessarily exhibit the characteristics of the discrete contract.

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358 Williamson *Contract Analysis* 42, citing Macneil. See e.g. McKendrick *Regulation* 307-310.
359 These have both been published in Beatson & Friedmann (eds) *Good Faith and Fault in Contract Law* (1995) at 291 and 305 respectively.
360 See e.g. the remarks of McKendrick *Regulation* 307; Eisenberg *Relational Contracts* 291 ff.
361 Noted by McKendrick *Regulation* 307.
362 McKendrick *Regulation* 308-309.
363 Bell *Long-term Contracts* 195.
364 Goetz & Scott *Principles* 153.
365 See in particular Eisenberg *Relational Contracts* 297.
366 Eisenberg *Relational Contracts* 297.

One of the factors, however, which has contributed in particular to this observation has been the insights offered by, in the words of Veljanovski and Williamson, the transaction cost approach.[367] By itself, it is not a model; undoubtedly though, it has contributed to scholars' thinking on the relational model. Rather, as an analytical approach to the economic analysis of law, it notes the contributions of the market approach to one's understanding of contract, with its use of the discrete transaction as its paradigm transaction, and suggests that contractual relations are not generally of this well-defined kind.[368] Whereas, in any analysis of contract, the emphasis in the market-based approach is on the technical features of contract, namely, the role played by legal forms and rules, it has been suggested that this results in too narrow an understanding. Such an approach, evidently, neglects to recognise the role played by the non-technical aspects of contract, that is, the role and influence exerted by the particular trading environment governing the duration of the contractual relationship, and the role played by the parties themselves, through their peculiarly human attributes.[369] In sum, this approach attempts to take note of a more diverse array of, in the parlance of law and economics, so-called *transaction costs*.

It is important to note from outset that the concept of a transaction cost has long since been employed as a tool in the economic analysis of the law, and is not confined to the transaction cost approach.[370] In the transaction cost approach, however, the emphasis on transaction costs is greater than in, for example, the market-based approach. It is, in fact, the former approach's *preoccupation*[371] with transaction costs which this study finds most useful. For in particular, by an analysis of the *causes* of transaction costs, scholars such as Williamson demonstrate the complex forces at work in contractual relationships. This, as shall be seen, permits a more realistic appraisal of the typical contractual environment.

3 2 The transaction costs approach

3 2 1 Transaction costs

Transaction costs, in the context of the law of contract, have been described as 'the costs of running the contractual relation'.[372] They have been identified as the costs of bargaining, that is, the costs of finding transactors, of negotiating the transaction, and policing and enforcing its terms.[373] Thus they refer to the costs that must be incurred by parties should they elect to engage in contractual relations with others. Likewise, they have been said to constitute the friction encountered by contractants engaged in activities in the wider market place which leads them to prefer one set of rules for settling a dispute or solving a problem than to

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367 Identified again in Williamson *Contract Analysis* 40 as an approach associated with Ian Macneil, Victor Godberg and Oliver Williamson.

368 Williamson *Contract Analysis* 39, 42. In particular, the market-based approach has been commended for disclosing the economic basis of contract.

369 Williamson *Contract Analysis* 40-42.

370 See e.g. its use as a conceptual tool in Posner *Economic Analysis*, chapter 4. Also Minda *Legal Movements* 90.

371 Williamson *Transaction-cost Economics* 233.

372 Macneil *Contractual Relations* 62.

373 Stephen *Economics* 31.

another.[374] Two sets of factors have been identified as the primary causes of transaction costs, namely, human characteristics, which is treated firstly below, and thereafter, environmental characteristics.[375]

The first human characteristic of relevance is that of *bounded rationality*. This refers to the fact that whilst not irrational, human behaviour is characterised by a limited rationality; we are bound by the very ordinary capacities of our brains and are able to receive, store, retrieve and process only a limited amount of information. Consequently, contractants may be overwhelmed by the complexity of circumstance, and not make the rational decision they originally intended to make. Many studies, both legal and economic, tend to overestimate human capability and regard the human mind as hyper-rational.

Opportunism, on the other hand, observes that human behaviour is not merely largely self-interested, but is characterised by cunning and guile. Contractants make false or empty promises in the hope of eliciting favourable reactions, cut corners for own advantage and seldom hesitate to bluff. While this is a generalisation and does by no means apply to all contractants, transaction costs are incurred by the precautions taken and the methods used to sort out those who are opportunistic from those who are not. Moreover, in contrast to bounded rationality, which suggests that decision-making by contractants may be less sophisticated than often thought, opportunism may be said to counter this: decision-taking may be roguishly calculated.

Encountered alone, these human characteristics may not create extraordinary transaction costs. Paired however, with environmental circumstance, and the minefield that is contracting is exposed.

Uncertainty-complexity is the first such environmental dynamic. The environment within which contractants are obliged to negotiate and barter, is fraught with uncertainty and complexity.[376] The world, after all, is a perplexing, capricious place, and the commercial world no less so. On the one hand, this may serve to trigger an unanticipated, irrational decision by a party; the foresight and shrewd decision-making so usually characteristic of a particular party may vanish in the baffling, confounding, intricate onslaught. On the other, poor decisions taken as a result of this capitulation might never be exploited by co-contractants were it not for their opportunism.

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374 Stephen *Economics* 184.

375 This analysis is the original work of Oliver Williamson (see *Contract Analysis* 61), and usefully summarised in Stephen *Economics* 184-193. The discussion of the influence of human and environmental characteristics is drawn primarily from these two works.

376 Goetz & Scott *Principles* 154: 'Complexity and uncertainty each play conceptually distinct roles, although they frequently operate in combination. For example, suppose a homeowner attempts to write a contract providing for the care of his fine home garden during a summer when he is out of town. Uncertainty is represented by the difficulty of determining in advance the climatic conditions, incursions of the gypsy moth, wind-borne powdery mildew, etc. Complexity is involved in specifying to the gardener exactly what responses should be made in each case: how much to spend on sprays, whether to water, when a diseased plant should be cut down to prevent infection of adjacent ones, and so on'.

The so-called *small numbers condition* is a second environmental characteristic of relevance. This refers to both the frequency of the particular transaction, as well as the number of potential contractants it may involve. Opportunism, for instance, is discounted where the transaction is of a recurring nature. No co-contractant revels in being taken for a fool for a second or third time; consequently, as a cause of transaction costs, diminishment of opportunism corresponds with the increasing number of bonds established between parties, and their moves towards a greater, more settled, relationship. A large number of potential co-contractants, likewise, makes more competitive the process by which terms are agreed upon between parties. In order to win co-contractants from the grasp of others, a party may be forced, in an act to gain favour, to show his or her hand, and thereby limit any opportunistic behaviour he or she may have considered.

Finally, the transaction *atmosphere* may contribute to the incurring of transaction costs. In Japan, for instance, opportunism may be frowned upon in an atmosphere of mutual respect and co-operation; the opposite, on the other hand, might be expected in the United States, with its emphasis on individualism. South Africa, with a culture which encourages the giving of favours, might regard opportunism as the norm.

Williamson goes on to make a very interesting classification of transaction types, and thereafter charts what he refers to as the relevant governance structures pertaining to each.[377] This is not important for the purposes of this study. What is important is that the transaction cost approach reveals a host of factors at play in any contractual relationship. The portrayal of the latter as lineal in relationship is shown to be simplistic; it involves, on the contrary, a web of intricacy.

3 2 2 Contingency

For the sake of convenience, it is suggested that the full range of forces which are said to be the cause of transaction costs - opportunism, bounded rationality, uncertainty-complexity and so forth - may be said to combine, in whatever combination or form or manner, to result in an inability to anticipate, or a difficulty in anticipating, what shall be termed *contingency*, that is, a turn of events which serves to turn a contract upside down: the collapse of the Australian wool market, the outbreak of war in the Far East, the rapid and unexpected introduction of information technology in a co-contractant's firm, or yesterday's stroke of tactical genius by the senior partner now regarded as today's blunder.

Contingency, of course, is a transaction cost. The change in circumstance caused by contingency may have a decisive bearing on the contractual relationship, and exact its own expensive price. Crucially, it may cause the balance originally established by the parties between their reciprocal performances to be upset. One party may have agreed to pay to another a fixed sum in exchange for a particular commodity still to be manufactured by the latter. Two months later, thanks to some intervening contingency, the commodity is found to be practicably worthless. Yet pay the party must.

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377 *Contract Analysis* 49-55; Stephen *Economics* 189-193.

Accordingly, contingency, it has been said, may have the result of giving the contract 'a different appearance from that which the parties wanted to give it at its conclusion, and which they had wanted to realise through the inter-play of the obligations arising from their agreement'.[378] Consequently, in their engagement with each other, one or both of the parties will incur costs either in their exposure to contingency, or in their attempts to provide for it, that is, to prevent it from upsetting the contractual balance they may have so delicately created.

This, of course, is not that easy.

On the one hand, given the bounded rationality of the parties, and the inevitably limited information at their disposal as to, for instance, the future, the precise scope and nature of all future contingencies (with respect to which adaptation will be required) cannot be anticipated. Moreover, even if anticipated from outset, it may often be that the adaptation required will not be evident until the actual materialisation of the contingency.[379] On the other hand, contractants would be ill-advised to ignore such possibilities. Here the opportunism of parties must be borne in mind. Where an unanticipated change in circumstance does arise, it will avail a party little to maintain the naive belief that his of her co-contractant will refrain from exploiting the opportunity in the event of it being offered. Where unrestrained by, for example, the application of the judicial concept of *bona fides*,[380] the co-contractant may well find himself fully entitled to gloat in the bonanza that Fate, in the form of a sudden and unexpected market fluctuation, has brought him.

It should be noted, furthermore, that contingency, as a transaction cost, works closely in tandem with time. The longer the period the parties are involved in a contractual relationship, the greater the likelihood that circumstance - different from that under which the parties originally contracted or anticipated - may be expected to change. Here one sees how the relational model of contract reflects the contractual environment more realistically than its discrete counterpart: it envisages that relationships do develop between parties beyond the mere exchange of performance. It is during the course of these relationships - which the discrete or classical contract does not predict or foresee - that contingencies may develop. Thus these risks to which contractants are exposed, of an increasing likelihood of being burdened with an unwanted contingency as their contractual relationship continues, have been called the 'bruises of time'.[381] It should be apparent therefore, that contractants might attempt to import measures whereby such 'bruises' might be minimised.

In what way, therefore, may the parties organise in advance for the modification of the rights and duties to correspond with the change in circumstance? The law of contract, in this respect, plays a role. It has been said to be a transaction cost-minimising mechanism.[382] It fulfils this role in two respects.

Firstly, the law itself, by various methods, may provide for such modification. This may be effected, for instance, by the implementation of specific legislation, or by within the general

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378 Fabre, cited by De Lamberterie *Long-term Contracts* 221.
379 Williamson *Contract Analysis* 43.
380 See e.g. Van Huyssteen & Van der Merwe 1990 *Stell LR* 244. Also 5 3 2 below.
381 Fabre, cited by De Lamberterie *Long-term Contracts* 221.
382 Stephen *Economics* 156-157; Botha 1992 *Stell LR* 324.

rules of contract, such as the rules concerning the interpretation of contracts or the doctrine of supervening impossibility. Secondly, the parties may themselves draw up agreements to govern certain contingencies, and these may be incorporated into contracts. In these roles it may be successful; at other times it may be less so. Important here however, is the collective name to be given to all mechanisms falling within the ambit of contractual law which attempt to counter the negative effects that may be inflicted upon a contract party or parties as a result of the materialisation of contingency. These mechanisms, accordingly, shall be said to constitute forms of *contractual adaptation*; that is, a specific form of transaction cost-minimising mechanism that pertains particularly to contingency.

The concept of contractual adaptation, therefore, that is, of *controlled planned contractual adaptation* in the face of a contractual relationship involving contingency, is consequently afforded further attention.

3 3 The contractual adaptation model in practice

Thus far, the concept of contractual adaptation has been largely explored in the abstract. Much will therefore be gained if specific reference is made to contracts encountered in practice which exhibit, or require, a measure of adaptation. Contracts requiring, if not incorporating, some form of adaptation may be said to include the following arrangements.[383]

3 3 1 Deferred performance contracts

The characteristic feature of this type of contract is that, even if the contract involves a once-off transaction, the date for performance is deferred and cannot take place at the time of conclusion of the contract. Difficulties may then arise if circumstances change after conclusion of the contract but before performance. A good example of 'gap' problems is where two parties conclude a contract of sale but delivery of the goods is only envisaged six months later. In the interim, the market for those goods could crash, the exchange rate could fluctuate wildly and the labour force involved in the production of those goods could embark upon a wildcat strike. On date of delivery, the market value of the goods could be out of all proportion to the price already agreed upon.[384] Consequently, in such arrangements, the parties may wish to be

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383 This classification is taken from Bell *Long-term Contracts* 196-198.

384 Bell *Long-term Contracts* 196 also refers to the example of a contract of option. Strictly speaking, of course, the date of performance is not necessarily deferred in a contract of option. Performance is immediate by the one party, in exchange for the contract price, undertaking to keep the substantive offer open. It is the giving of this undertaking that constitutes performance. Consequently, it is rather the *exercise* of the right created by the option contract, namely, to accept the substantive (as distinguished from the option) offer, that is deferred, or, more accurately, that could be deferred; this is in the case where, in an option involving the sale of property granted for a period of five years, the option-holder decides three years into the option to purchase the property, thereby exercising his right of option. The exercise of the right created in terms of the option does, however, correspond with the date of conclusion of the substantive contract (viz. the contract of sale) envisaged by the option contract (in its capacity as a *pactum de contrahendo*). Unless it may in some way be provided otherwise, the price 'agreed' upon for the substantive contract will be the same as incorporated in the original option. With respect to the latter, price is fixed the moment the offer of

unspecific about many of the details of the contract, including price. Alternatively, the parties may wish to create some mechanism whereby price, for example, may be adapted closer in time to the date of performance. One may note further, that this type of problem is encountered in both short-term and long-term contracts: the 'bruise of time' refers here not to the period of the length of the overall relationship between the parties, but the period between contract conclusion and performance, irrespective of the duration of the relationship within which the contract is encountered.

3 3 2 Contracts with a long performance time

This class incorporates those contracts which require a considerable period of time to be implemented, or the period envisaged for performance is long-term. Examples are construction contracts and lease agreements, whether of movables such as office equipment or of property.[385] Difficulties arise here where changes in circumstances occur *during* the performance of the contract. These contracts too offer scope for contractual adaptation.

3 3 3 Long-term contracts

Parties may find themselves in an arrangement whereby over a long period of time, they are continuously entering into a series of contracts with each other, or involving a series of acts of performance.[386] In these circumstances, there may be a strong incentive to maintain this relationship. The relationship may, for instance, involve transactions which are very transaction-specific.[387] This entails that transactions between the parties involve resources (both human and physical) which are very specialised, or idiosyncratic. The seller of certain goods, for instance, might be the only seller of those goods in the country, whilst the purchaser might be one of the few users of those goods.[388] Likewise the seller of the goods might, in manufacturing the goods, have to invest heavily in specialised equipment in order to

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option is accepted, as price is a term of the substantive offer which forms the content of the option contract. Consequently, one encounters a similar gap (as referred to in the text above) between the moment of setting of price (at the moment the offer of option is accepted) and the moment when price becomes judicially relevant in the sense that it can be acted upon. As in the example given in the text above, a great deal can happen during this period.

385 On this characteristic of lease, see *Diners Club SA (Pty) Ltd v Thorburn* 1990 2 SA 870 (C) at 874A.

386 Bell *Long-term Contracts* 197; Williamson *Contract Analysis* 52-53. See also, in general, Macneil *Contractual Relations* 61 ff.

387 Williamson *Contract Analysis* 52-53; Bell *Long-term Contracts* 199.

388 Of course, such a so-called bilateral monopoly may in itself be sufficient to create the necessary will in both parties to maintain the relationship, in that each is dependent on the other, as sole supplier on the one side and sole buyer on the other. See e.g. Bell *Long-term Contracts* at 201 as to these binding 'non-legal' forces. The situation as sketched here of a bilateral monopoly could, on the other hand, lead to what has been termed 'unified governance' or 'vertical integration' (Williamson *Contract Analysis* 53-54; Goetz & Scott *Principles* 154-155); that is, where a single party spans both sides of the transaction, namely, as both seller/supplier and purchaser. Macneil (*Contractual Relations* 65) calls this the 'penultimate relational pattern in modern contracts[,] the large firm itself'. See his example at this reference, and how this may typically result.

manufacture the latter, and the expense of this investment might not be transferable to other contracts because the use of this equipment is severely limited, namely, in the manufacture of those goods only. Both parties, therefore, have an interest in maintaining the relationship. At the same time, however, they will be conscious that, given the long-term duration of the relationship, contingencies might arise which may well upset the balance of mutual reciprocal performance which they originally created. If the relationship is to continue, the balance must clearly be restored. It is apparent therefore that adaptation in these circumstances is required.

3 3 4 Conclusion

From the above, it is observed that adaptation is required with respect to a change of circumstance which may result during one of the following periods: the period between the conclusion of a contract and the performance envisaged therein; the period during which performance takes place; and the period during which the contractants are overall engaged in relationship.

3 4 The principal problems of contracts requiring adaptation and their relation to certainty

3 4 1 Introduction

It should at this stage be clear that contingency presents a special area of concern to the contractant in the types of contracts referred to above. In particular, it affects the planning and specificity of obligations undertaken by parties. These become that much more difficult in these contracts, in relation to the discrete contract, because of the added complexities and uncertainties that contingency brings.[389] How do parties plan for such contracts? How can they risk specifying the duties each will incur, well-knowing that some unanticipated change in circumstance might make nonsense of their expectations?

3 4 2 Certainty and adaptation: the crux of the matter

It is at this point that the *requirement of certainty* clashes with the concept of contractual adaptation. The requirement of certainty demands that the content of contracts be determined with certainty and reasonable precision. This includes terms which in all likelihood will be affected by the materialisation of contingencies, as referred to above. In this respect, the parties evidently have a number of choices.

Firstly, parties remain open, of course, on the establishment of the contractual relationship, to fix terms with precision from outset. This would then comply with the requirement that all terms in a contract should be certain. This occurs, for example, whenever the parties immediately agree upon a fixed price, without providing for some form of price adjustment clause; the allocation of risk is, accordingly, likewise fixed from outset. On the materialisation of a contingency therefore, and depending upon this risk allocation, one or both parties stand to

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389 Bell *Long-term Contracts* 198; Goetz & Scott *Principles* 153-154.

lose. The market value of the goods in question may in the interim increase, to the benefit of the buyer, or plummet, to his or her detriment. This, however, was to be expected, and, indeed, was bargained for. It consequently offers a reasonable strategy to parties who are content with a speculative element in their bargain. Likewise, it may be an approach utilised by parties who, though not in favour of any agreement with an overly speculative nature, transact within a contractual environment noted for its stability and not volatility; any speculative element is thus kept to a minimum.[390] In this respect, the paradigm of the classical contract, i.e. a discrete spot sale under market conditions, springs to mind.[391]

On the other hand, not all parties are content to include a speculative element in their agreements, or have the good fortune to contract under stable environments. Thus, secondly, contractants may apparently invest a great deal of resources in the prediction of contingencies, and expend further resources in the creation of precise contractual mechanisms, which, while without infringing upon the requirement of certainty, are nonetheless capable of effecting adequate adaptation to that particular affected term to the mutual satisfaction of both parties. The extent to which this can be achieved successfully, is doubtful.[392] The costs of planning and creating such mechanisms in such attempt will usually be very large, and the possibility is naturally that some aspect has been overlooked.[393]

Alternatively, parties may forsake certainty and create mechanisms which respond to the change in circumstance as it materialises. It would be here be argued that it is simply not possible to provide from outset and with precision for all possible contingencies. Specificity is here the antithesis of the required adaptation: the contingencies with respect to which adaptation is required are of an unknown nature; mechanisms created to effect adaptation can therefore not be too limited and specific in scope if they are serve any use at all. It has accordingly been stated that, under such circumstances, 'the degree of specificity with which contractual obligations should be determined long in advance may well be less, at least from an

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390 See here Trakman 1983 *Modern Law Review* 48-49 who argues that the practice of allocating risks from outset is a frequent one, and one employed deliberately. This point is made, nonetheless, not in order to suggest that this is necessarily the best approach to contingency, but that parties are frequently happy with this approach. Trakman's concept of initial risk allocation is, however, a wide one, and covers not only those situations where the parties have agreed upon fixed terms, but also where they have provided for some form of later modification or adjustment to the contract.

391 It follows, therefore, why a discrete contract is characterised by a clear and precise definition of the subject matter of the transaction, its quantity and the price, as noted by McKendrick *Regulation* 308-309, cited in the second footnote to this chapter.

392 Doubtful, that is, in the sense of achieving successful adaptation *no matter* the type and effect of the contingency. Of course, parties may attempt to provide for adaptation under certain circumstances only, and appreciate that by the creation of precise contractual mechanisms, *all* contingencies cannot be provided for; here again, the parties in such circumstances accept a certain speculative element in their agreement. See again Trakman's point in the footnote immediately above.

393 One might refer here to the additional costs of lawyers, draftsmen, actuaries, analysts and gypsy soothsayers. In addition one cannot discount time costs incurred in the prolonged negotiation of such an agreement, and the disadvantages of a highly cumbersome contractual document, with its very intention to cover all loopholes a cause of inflexibility. Ultimately, such an attempt to allow with precision for all eventualities amounts to nothing more than speculation.

economic point of view, than in one-off instantaneous contracts'.[394] In short, contractual terms should not be characterised by certainty, but by flexibility.

Yet this, as stated, is from an economic point of view. The law places a somewhat higher premium on certainty. Certainty of terms, firstly, is vital for the establishment of consensus. The establishment of consensus in turn serves to assure the law that, because the law only gives effect to arrangements brought about by consensus, it is giving effect to the intentions of the parties. Policy, after all, is not served by the law placing the full weight of judicial machinery behind contractual terms which, for want of certainty, cannot be said with any substantial degree of confidence to have been intended by the parties. Consequently, judicial enforcement of certainty (as a requirement) is demanded by the very contractants themselves who desire the security of knowledge that they will not be compelled to perform in terms of some contractual provision with respect to which they did not agree. The requirement of certainty, therefore, although appearing at first glance as a hindrance, can by no means be jettisoned altogether.

It is left, therefore, to Williamson to provide the proper perspective on contractual adaptation and certainty. Williamson states that that which is required is 'some way for declaring *admissible dimensions for adjustment* such that flexibility is provided under terms in which *both parties have confidence*' (my emphasis).[395]

It is in this short statement that one discovers the crux of the problem: the need for *flexibility* in the face of daunting contingency coupled with the *security* required of by parties as traditionally provided by the requirement of certainty. Flexibility, of course, constitutes the purpose of adaptation. Security, on the other hand, performs a different role, and is demanded in two respects.

Firstly, and in the sense most closely tallying with the traditional role of certainty, it refers to the confidence of the parties that the adjusted term will provide adequately for both parties' individual expectations and intentions, and not for consequences the parties would have had no intention of ever agreeing upon. The requirement of certainty had always provided for this role: no legal effect was given to terms with respect to which it could not be said the parties had agreed upon with certainty. Contractual adaptation must therefore likewise fulfil this role if it is to gain the confidence of the courts who have proved over the years to be particularly fond of the certainty requirement.

Secondly, it refers to security of tenure, that is, that both parties may be confident that *despite* the adjustments, the contract will continue to be binding. These two aspects of security are, therefore, interdependent: without security of tenure, the parties will care little if the adjusted term does or does not reflect adequately their individual intentions; a party dissatisfied with the adjustment may always refuse to be bound. Likewise, without a reciprocal confidence in a satisfactory performance by the adjustment mechanism, the parties will be most reluctant to hitch security of tenure to the adjustment agreement. The business world, it might be said, likes to gamble on a sure thing, and its inhabitants are not generally prepared to bind themselves to consequences with respect to which they are not entirely convinced.

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394 That is, than in the case of the discrete contract of classical law: Bell *Long-term Contracts* 198.
395 53.

In sum, therefore, flexibility and security may be said to constitute the *essentialia* of adaptation. It is accordingly these *dimensions* that remain to be explored within the context of sale.

CHAPTER FOUR: PRICE ADAPTATION IN THE CONTRACT OF SALE

4 1 A refocus on sale: the link between price adaptation and objective ascertainment

Thus far, attention has been drawn to the requirement of contractual adaptation with respect to contractual terms in general. The focus of this study, however, is the contract of sale, and more particularly, the requirement of certainty of price. In the context of sale, the price agreed upon is the term perhaps most susceptible or reflective of changed circumstances. Price in sale reflects, in terms accessible and understandable (that is, by way of monetary terms), the value placed by the parties on the exchange of resources about to take place. In the event of a contingency affecting the value of this exchange consequent to a price being fixed, the role price plays in this respect is likewise affected. In the event, it shall either, in the view of one or both of the parties, reflect too high a value to be placed on the exchange, or too low a value. The upsetting of the balance between the reciprocal performances by the parties is thus most keenly evident in the parties' opinion as to the accuracy of price (in its role as the measure of the value to be placed on the exchange) consequent to the materialisation of the contingency.

Of course, such an upsetting of this balance may be regarded as a natural risk of the market. By agreeing on a fixed price, the parties may allocate the risk of a consequent decline in the goods' market value to the purchaser, and an increase to the seller. The parties may be happy to do this not only where delivery and payment follows immediately upon conclusion of the contract, but also where performance is delayed. This speculative element may be a significant and intentional element of their deal, holding out as it does the possibility of greater profits for one of the parties. This may be most attractive to a party who thinks, for instance, that she has read the markets better than her co-contractant. On the other hand, this apparently speculative nature of fixing price from outset may occur within an environment characterised by stability. Consequently, the costs involved in providing for contingency may be regarded as disproportionate to the, apparently, negligible risk of contingency, and deemed as not worth incurring. In this case, the parties may again be happy to set a fixed, invariable price at outset, as this is regarded as not overly speculative. Prolonged negotiations over complex adjustment clauses may seem a pointless and costly exercise in the light of the actual risk of a dramatic change in circumstance. Price adaptation, consequently, should not always be seen as indispensable from the viewpoint of the parties. As far as contingencies are concerned, there is always room for a little calculated speculation.

On the other hand, it is clear from the previous chapter that not all parties are content to fix price from outset, or are happy to contract under such speculative circumstances. Consequently, there is, at the least, some need for contractants to be able to provide for an *adapted* price; that is, a price that may be adjusted to meet the new circumstances.

Of course South African law, as we know, requires that the price in a contract of sale be certain or ascertainable; or effectively, that a price be capable of being determined with reasonable precision. As would follow from the previous chapter with respect to terms in general, there exists likewise, and *prima facie* at least, difficulty in reconciling the flexibility that is required

on the part of price in order to be responsive to changed circumstances or contingency, with the certainty required in terms of this well-known rule. Contractual adaptation, therefore, if it is to be successfully implemented within the South African law of sale, must by some means provide for adequate consideration of the latter rule.

This, however, leads us directly to an important point. For it is, in fact, in a statement of this very rule that the concept of price adaptation can be shown not to be too far removed from the traditional outlook on price-setting. For in the rule that price need not only be immediately certain, but also *objectively ascertainable*, the law provides immediately for some measure of price adaptation: that is, it permits parties to provide for a *later* determination of price, possibly closer in time - for example - to actual performance, following conclusion of that intervening time period in which all contingencies may be expected to arise. Of course it is not argued here that *all* cases where price is made to be not certain but merely ascertainable are cases of attempted contractual adaptation. Parties may prefer to make price ascertainable simply because at the time of contracting, they do not know the exact price but know that it is obtainable, by way, for example, of reference to an outside document or by mathematical calculation, or because they cannot reach agreement and may prefer to delegate this responsibility to a third party. Nonetheless, the fact that the later ascertainment of price may result in price being determined closer in time to actual performance, and consequently result in a price more responsive to contingencies that may have materialised in the interim, indicates that *the concept of price adaptation is by no means foreign to the traditional outlook on price-setting*. It is, after all, under the rule of that price may also be objectively ascertained that commercial practice has managed to obtain the acceptance of price escalation clauses, which have already been studied to some extent under the discussion of what is meant by objective ascertainment, at **2 4**. *Hill Brothers & Co v Alexander & Jones*, *Standard Industries Ltd v Marwick* and *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd*, for example, all contain provisions by which the parties clearly intended to provide for an ascertainment of price closer to any consequent appearance of contingency.[396]

Price adjustment or escalation clauses, as well as a host of other means by which parties attempt to provide for price adaptation, will be discussed in the following chapters. The rest of this short chapter, however, focuses upon the *particular circumstances* under which price adaptation in a *contract of sale* may be required. These, after all, may differ from the circumstances under which contractual adaptation in general is required, as suggested in **3 3**. For it is only when clarity exists as to when price adaptation is required, that one may move on to an analysis of how this is in fact achieved.

4 2 Sale distinguished from other contracts requiring adaptation

In *Diners Club SA (Pty) Ltd v Thorburn* one encounters the following:

> [A] distinction [may] be drawn between two types of contract, namely contracts like sale which purport to define the rights and obligations of the parties and put a definite limit to them once

396 (1891) 12 NLR 202; (1920) 41 NLR 83; 1964 1 SA 669 (W).

> and for all, and contracts like lease which can endure for an indefinite time and which can define the rights and obligations of the parties for an indefinite period.[397]

In this *dictum*, it would seem to be suggested that in a contract of sale an attempt is always made to define terms with certainty from outset. This would be misleading. For should this be so, there would be no room for the concept of price adaptation within sale: price would have had a definite limit placed on it once and for all; there would be no allowance for adjustment. The *dictum* is thus a generalisation. While it is true that in accordance with the requirement of certainty, parties to a contract of sale do often purport to define terms such a price with certainty, to maintain this is always so would be to deny that written above in connection with price adaptation, and moreover, would probably be to read the *dictum* out of context. It is clear that parties do not always attempt to define the contents of their contracts, such as price, with precision; they wish frequently to make provision for future contingency.

On the other hand, the *dictum* is an useful one. It indicates that the contract of sale does not necessarily involve the establishment of a relationship between buyer and seller that extends beyond the instantaneous exchange of certain goods. Such a situation may well in fact represent the norm - if, for instance, the norm may be said to be represented by that transaction occurring most frequently. Consider, for example, the purchasing of groceries in a supermarket. Purchaser and seller negotiate briefly, meet to agree, effect exchange, and then disappear, frequently in a manner as anonymous as that in which they first met. In contrast, contracts such as lease involve invariably a relationship of some kind. Performance in these contracts is not, and cannot be, instantaneous. It extends over a lengthy period of time, and may endure indefinitely. Performance in a contract of service, for example, only ends on the completion of the contracted work; performance in lease, by the same measure, only terminates on the eventual termination of the lease. Consequently, throughout this period of performance, a relationship subsists.

This serves to aid one's examination of adaptation with respect to sale in two respects.

Firstly, the first time period (that is, the period in which contingency may arise) that may be highlighted as requiring adaptation in sale is that of the period (or 'gap') between conclusion of the contract and performance. The performance envisaged in sale (namely, the moment when the seller delivers the *merx* in exchange for the agreed price) may be relatively instantaneous, but the period between conclusion of the contract and this moment of exchange is open nonetheless to unexpected change in circumstance. This may be contrasted with contracts of lease and service where it is usually *during* performance that circumstances may be expected to change. Given that performance in sale is invariably not an enduring affair, this is seldom, if ever, a period of concern to the parties to a sale. Accordingly, the focus with respect to contractual adaptation in the contract of sale shall be centred on the first of the time periods mentioned above, namely, the period between conclusion and performance, and not on the second, namely, the period of performance.

Secondly, although correct in indicating that contracts such as lease invariably involve a relationship of not insignificant length between the contractants concerned, the *dictum* above is misleading should it be held to suggest this to be never the case in sale. For albeit that buyer

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397 1990 2 SA 870 (C) 873J-874A.

and seller do not necessarily, or even usually, form a relationship beyond that of the instantaneous exchange of goods, it is conceivable that such a relational contract might be entered into. If such a relationship can indeed be shown, then the third time period relevant to adaptation is also relevant, namely, that period during which a relationship subsists between buyer and seller. This relationship exists, in any event, even during the period (however brief this may be) between the conclusion of the contract and performance. However, it may also involve a relational period extending beyond this. This is demonstrated in two examples, the first of which is provided by Macneil.

Macneil refers to the example of a smelter requiring coal for his smelting operation. The first phase in the contractual relationship created between them is that of the smelter making a spot purchase of 500 tons of coal from (at this stage) a stranger in a market of many sellers; this is the paradigm of a discrete transaction, that is, a transaction that starts sharply, is short-lived and ends sharply, either by clear performance or clear breach.[398] Gradually, however, the relationship between smelter and coal merchant becomes more intricate. The smelter, firstly, becomes a regular client; thereafter he makes orders of coal in advance. Soon they agree on a year contract for the supply of coal, and then specifically agree on a quarterly price escalation clause. A hardship clause is thereafter incorporated, and the parties agree to lengthen the period of contract to twenty years. Agreement on a joint venture follows shortly thereafter, and ultimately the parties merge.[399]

Important in the above example is that intrinsic throughout is that of a contract of sale. Until the moment the parties merge the transaction is, at its most basic, a sale of coal by the merchant to the smelter, and the moment of performance remains that instant when the coal is delivered and the money paid over. Performance remains therefore essentially instantaneous, and adaptation is required for that period between agreement on price and later delivery. Mechanisms created to implement adaptation for this period, and encountered in Macneil's example, are that of the escalation and hardship clauses.

At the same time, however, it is clear that a relationship has developed. After each transaction, smelter and merchant do not disappear. Rather, they are engaged in a long-term relational contract. Between individual transactions of coal (where the period requiring possible adaptation is viewed as that period between agreement and delivery), and thus throughout the whole duration of the relationship, contingencies may arise which, although perhaps not directly affecting price immediately, may - because of the relationship that has developed between the two - affect any agreement on price in the future. Adaptation may be required thus for this period too.

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398 Paraphrased from Macneil *Contractual Relations* 65.

399 Macneil indicates (66 ff) how the erosion of discrete characteristics of transactions commences almost immediately. The moment in fact that buyer and seller cease to be to each other nameless businessmen in a vast market and begin to interact *beyond* (and even before) the instant of exchange (by, for example, the seller stockpiling coal in anticipation of the buyer placing an order, or the buyer placing an order in advance), one gradually moves into the realm of the relational contract, and with it, the need for adaptation.

This is shown likewise in a case such as *H Merks & Co (Pty) Ltd v The B-M Group (Pty) Ltd and Another*,[400] which, again in essence, concerns a contract of sale for cosmetic goods between a buyer and a seller. This 'sale', however, is a good deal more complex than that. In terms of the parties' agreement, the appellant had been appointed, for a period of five years, 'the exclusive sales agent, distributor and purchaser' for South Africa of the goods in question, and which it was to purchase from the respondent. In turn, the latter agreed not to sell such goods to any other distributor, and to supply the appellant with stock each year. Throughout this period of time, consequently, the affairs of the respondent and seller were to be tightly and inseverably linked; forecasts of the amount and type of stock required were to be frequently exchanged, and increases in price were apparently to be agreed upon, in the light of current market conditions. But no matter the complexity of the agreement, it remained essentially a contract of sale, and it was precisely on the question as to how the parties had attempted to provide for the adaptation of price, over the course of this lengthy period, that the parties found themselves in court.

Thus a contract of sale is not necessarily as clear-cut a phenomenon as *Diners Club SA (Pty) Ltd v Thorburn* might make it out to be. While it may often involve the instantaneous exchange of goods, with no period thereafter in which a contingency may upset the balance of performance, this is not necessarily the case. Frequently it may find itself at the core of an intricate, lengthy relationship. At the least, therefore, an adaptation mechanism created to aid adjustment within the context of sale, may be created with either of the following in mind: a change in circumstance that may materialise during the period between the conclusion of a particular agreement between the parties and performance thereof, and a change in circumstance that may materialise during the period during which the relationship exists as a whole.

4 3 The envisaged approach to price adaptation in the contract of sale

This chapter has confirmed that the concept of contractual adaptation within the contract of sale is a relevant one; this is particularly so with regard to the implications it holds for the later modification of price where the balance established between performance and counter-performance, as reflected by price, is threatened by a change in circumstance caused by a contingency. In particular, this contingency may arise consequent to the conclusion of a contract of sale but before its performance, or during the period in which the buyer and seller are engaged in a relationship. It has moreover been shown that in the rule that price need not necessarily be immediately certain, but also objectively ascertainable, the concept of price adaptation already finds a foothold. In **2 4**, in our encounters with price adjustment clauses, it has already been seen how parties may make use of this rule to provide for the later determination of price closer in time to actual performance. In hindsight now, this appears to be an obvious means of importing price adaptation.

But is this the only means by which price may be adapted? More pertinently, is it only through price adjustment clauses that this foothold into price adaptation may be exploited? In the following two chapters, therefore, an attempt is made to provide an overview of the various techniques and methods used to provide for adaptation of price; some of these may

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400 1996 2 SA 225 (A).

directly flow from the rule that price may be objectively ascertainable, others less so. But the question throughout is how one arranges for the modification of price, and the flexibility this requires, whilst ensuring that, if at all possible, the requirement that price be certain is likewise respected. As should be evident from the discussion at **3 4 2**, this is by no means an easy task. Throughout this overview, therefore, the three *essentialia* of adaptation will consequently be kept in mind, viz. (i) the flexibility to adapt to the change in circumstance, (ii) the security that despite this flexibility, one is not being bound to a price with respect to which one would not have had any intention of agreeing, and (iii) security of tenure, that is, that throughout the process of adaptation, the contractual relationship remains on a sound footing. Thus the various techniques and methods used shall be evaluated to the extent each satisfies the peculiar demands of each of these *essentialia*, and accordingly, a conclusion shall be reached as to its specific usefulness as a price adaptation method. The approach taken in this evaluation, moreover, is a simple one, and is borrowed from De Lamberterie.[401] Thus, following the latter's cue, an examination may firstly be made of price adaptation tools provided by the law itself, whether this be by means of specific doctrines, through the medium of the courts, or by legislation. Thereafter, one may examine the techniques used by the parties themselves to provide for, in advance, the possible modification of price. Chapter 5 concerns, therefore, price adaptation *ex lege*, and Chapter 6, *ex consensu*.

401 *Long-term Contracts* 221.

CHAPTER FIVE: ADAPTATION TOOLS PROVIDED BY THE LAW

5 1 Introduction

In this chapter, consideration is given to the means by which the law itself provides for some manner of price adaptation. Whilst the doctrine of supervening impossibility might appear to lie closest at hand, especially when the need for price adaptation results from a dramatic change in circumstance, it appears that the law, through the medium of the courts, have provided for other subtler means too. A brief examination will also be made of the way in which modification of price by the courts is a direct possibility in various European jurisdictions, and the extent to which this may be plausible in South African contract law.

5 2 Supervening Impossibility of Performance

South African contract law has traditionally provided for a change in circumstance by way of the doctrine of supervening impossibility. This doctrine holds that when, as a result of events occurring subsequent to the conclusion of the contract, it becomes impossible for a party to perform in terms of an obligation, that obligation becomes extinguished.[402]

It is usually said first, however, that impossibility of performance only extinguishes the obligation in question when the impossibility is absolute (objective). Traditionally, this would be held to mean that performance must be objectively impossible - that is, impossible for not just the debtor, but the world at large. As has been pointed out, however, objective impossibility should not be taken too literally.[403] Thus in South African law, whether performance is possible is determined by reference to a standard of society (''n verkeersmaatstaf'[404]), and that accordingly, impossibility will include cases of actual physical[405] or legal[406] impossibility, as well as cases where performance is physically possible, but cannot reasonably be expected to be rendered.[407] Furthermore, while the point of departure remains that mere difficulty in performance, or the fact that performance has become more expensive, will not amount to impossibility,[408] it has also been stated that

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402 See in general Lotz *LAWSA XIX* par 258; De Wet & Van Wyk *Kontraktereg* 172-177; Van der Merwe et al *Contract* 383-387; Lubbe & Murray *Contract* 764-774; Joubert *General Principles* 293-296; Hutchison *Wille's Principles* 497-499.

403 Lotz *LAWSA XIX* par 258.

404 De Wet & Van Wyk *Kontraktereg* 174. Also Van der Merwe et al *Contract* 136, 384.

405 Where, for example, the obligation was to deliver property, and the property is destroyed by fire before delivery.

406 See the facts of *Bekker v Duvenhage NO* 1977 3 SA 884 (E).

407 Van der Merwe et al *Contract* 384; at 136 n 11 the authors indicate that in this context factors such as practical and economic expediency and fairness play a role.

408 De Wet & Van Wyk *Kontraktereg* 174: '*Difficultas praestandi* is nie gelyk aan onmoontlikheid nie'. Reference is then made to Voet 22 1 29. Also Lotz *LAWSA XIX* par 258 and the facts of *Yodaiken v Angehrn & Piel* 1914 TPD 254, and *Hersman v Shapiro & Co* 1926 TPD 367.

application of the above standard of society may nonetheless regard a situation where to perform 'may be so difficult and lead to such economic or other hardship' as amounting to circumstances of objective impossibility.[409]

Secondly, termination of the obligation will not follow where the impossibility to perform is a consequence of the fault of the debtor.[410] This is sometimes phrased by saying that the debtor is released when prevented from performing by *vis maior* or *casus fortuitus*.[411] It can thus be seen that the ratio for excusing the debtor lies in the fact that the resultant impossibility was unavoidable; if the debtor could have taken reasonable precautions to avoid the impossibility, there is clearly no *vis maior* or *casus fortuitus*, and his failure to do so means that he is at fault. It can thus be seen that the doctrine (and thus in particular, the prevailing view of what should constitute impossibility for a debtor) is in fact the expression of our law's views on the equitable allocation of risk under such circumstances.[412] Thus if the debtor was responsible himself for the impossibility (i.e. he is at fault), his duty to perform in terms of the obligation is not extinguished; his failure to perform amounts thus to breach of contract. The risk of impossibility thus remains with the debtor at fault. However, in cases where there is objective impossibility and which cannot be attributed to the debtor, the law regards it as inequitable for either of the parties to be allocated the risk of impossibility, and thus the obligation is terminated. This can likewise be seen again in the next major 'rule' usually cited, that is, a debtor is not released from performance which has become impossible if he himself has taken on the risk of impossibility.[413]

It may further be noted that Kerr, in the context of this doctrine, nonetheless declines to make use of the term of impossibility, unless used in a specific context where traditional physical impossibility is intended. This would be, for example, where after the conclusion of a contract of sale but before delivery, the *merx* is physically destroyed. Kerr states that the doctrine may, after all, also be invoked where there occurs only partial or temporary impossibility, or where, while performance may not be said to be impossible, the form of performance that is possible is so different from that which was contemplated as not to be within the scope of the

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409 Van der Merwe et al *Contract* 136.

410 De Wet & Van Wyk *Kontraktereg* 172; Lotz *LAWSA XIX* par 258; Hutchison *Wille's Principles* 497-498. See also e.g. *Benjamin v Myers* 1946 CPD 655; *Bischofberger v Van Eck* 1981 2 SA 607 (W).

411 De Wet & Van Wyk *Kontraktereg* 172. *Vis maior* and *casus fortuitus* may be said to consitute a turn of events, emanating from nature or man, and which are irresistible and beyond the control of the ordinary person, and which in turn may be unforeseen or unforeseeable: Van der Merwe et al *Contract* 384; Lotz *LAWSA XIX* par 258 n 9; Hutchison *Wille's Principles* 498. Also e.g. *Peters, Flamman & Co v Kokstad Municipality* 1919 AD 427; *Bayley v Harwood* 1954 3 SA 498 (A).

412 Lubbe & Murray *Contract* 770 n 2.

413 See *inter alia* De Wet & Van Wyk *Kontraktereg* 174-175; Lotz *LAWSA XIX* par 258; and the facts of e.g. *Hersman v Shapiro & Co* 1926 TPD 367. Note here Lotz's submission in *LAWSA XIX* par 258, that is, that in *all* cases of (objective) impossibilty, the obligation is terminated, irrespective whether the debtor was responsible for the impossibility or if he has undertaken this risk himself: for performance in terms of *that* obligation is simply impossible. Any *consequent* liability for the debtor (i.e. because he was at fault or undertook the risk himself) arises in terms of a *new* obligation which follows from his not performing in terms of the previous (since rendered impossible) obligation. Cf. Lubbe & Murray *Contract* 772 n 8.

contract.[414] The above writer would appear therefore to make a clear link between the set of rules present in our law providing for termination of an obligation (and known ostensibly as the doctrine of supervening impossibility) and the concept of a *change in circumstance*, so inherent in any discussion of price adaptation.[415] Be that as it may, it should be noted that whatever label we attach to the particular circumstances which must be present before one might invoke the doctrine in question, the fundamental content of the doctrine of objective impossibility, or whatever label this might be, cannot be regarded as being in doubt. As pointed out above, the doctrine is not limited by any absolute use of the concept of impossibility. It has moved beyond a literal interpretation of the latter, to recognise that in the sphere of performance, few things are impossible in an absolute sense, but take up positions along that line which we might term degree of difficulty. As observed by De Wet & Van Wyk, objective impossibility is determined by reference to ''n verkeersmaatstaf', and this standard, it has been said, encompasses both instances of physical impossibility as well as where performance is physically possible but cannot reasonably be expected to be rendered.[416] The *substance* of this test is therefore supple enough to cover any situation Kerr should have in mind, though it is a different question whether the courts in applying this standard are prepared to go to the extent Kerr would seem to be prepared to go in the application of his own test.[417] The general position remains that difficulty in performance, or the fact that performance is now more expensive, is no justification for the invocation of the doctrine.[418] It may however be arguable that, if in particular one bears in mind that the doctrine of supervening impossibility does not always entail instances of literal impossibility, it may be more useful to rename the doctrine in such a manner so as to place greater emphasis on the fact that the contract has been overtaken by a change in circumstance. Consequently it would be the extent to which there has been such a change that would determine whether the doctrine may indeed be successfully invoked. Furthermore, there are also suggestions that our law may do well to develop its outlook regarding changes in circumstances or supervening impossibility upon some other basis, such as the concept of good faith.[419]

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414 Kerr *Contract* 164. Accordingly, Kerr notes at 165 and 404 that he regards the modern rule as asking whether, despite the kind of performance envisaged in the contract being physically possible, it is in fact 'vitally different from what should reasonably have been within the contemplation of the parties when they entered into the contract'. Kerr takes this test from Williston.

415 Consequently, in *Contract* 403, Kerr refers to an 'absence during the currency of the contract of the circumstances necessary for the operation of the contract'.

416 Van der Merwe et al *Contract* 136, 384.

417 Kerr (*Contract* 407-410, especially 403 ff) has suggested that our law has reached the stage where it is prepared to regard obligations as terminated under circumstances which in English law would be said to constitute frustration of the contractual purpose, but this has been criticised; cf. Lubbe & Murray *Contract* 773.

418 See above.

419 That is to say, for example, that the enforcement of a contract under circumstances not envisaged at the time of contracting would amount to a breach of good faith. This approach draws from the increasing recognition of good faith as a principle applicable to all contracts. See here Lubbe & Murray *Contract* 773-774; Van der Merwe et al *Contract* 387; and see Christie's favourable comments regarding this suggestion in Christie *Contract* 19. See also the discussion of good faith in South African contract law at 5 3 below, and the recent publication by the South African Law Commission of its proposed Bill on the Control of Unreasonableness, Unconscionableness or Oppressiveness in Contracts or Terms, referred to in the final footnote of this chapter. There is also the possibility of basing an approach upon the so-called *clausula rebus sic stantibus*, the basis of

For all this debate, however, a final factor begs here for consideration. Whatever the precise circumstances under which the doctrine of supervening impossibility may be invoked, or whatever label we attach, it should be apparent that its usefulness as an adaptation tool is limited. For the result of a successful plea is discharge of an obligation; South African courts have no discretion to alter or modify the contract before them. The debtor is completely released from his obligation, and where such an obligation is not severable from the balance of the contract, this may entail that the entire contractual relationship is thereby severed. Therefore, in only one sense is contractual adaptation truly served, viz. the security enjoyed by the parties in knowing that at least under such changed circumstances, they do not remain bound to contractual consequences they did not contemplate or perceive. Flexibility, on the other hand, is provided in the sense that the parties are cut loose from an obligation no longer appropriate to the new circumstances, and that they are accordingly free to agree afresh on new obligations. This, however, may count for little if it is considered that the parties enjoy little security of tenure. Any variation that may be agreed upon is dependent once more upon a fresh co-operation between the parties; the parties are not compelled to agree upon new terms while remaining contractually bound.

Nonetheless, this lack of security of tenure must not be overstated. Where parties find themselves in a long-term relationship and a so-called bilateral monopoly has emerged, the need of both parties to remain in contractual relationship may ensure that both parties have the will not only to enter into renegotiations but also to carry it through to completion and fresh agreement. Thus following frustration's threat of termination, the parties renegotiate modification themselves. This, accordingly, has been said to be an important consequence of the English doctrine of frustration, which like the South African law on supervening impossibility, only allows for termination by the courts.[420] However, in the absence of such constraining forces typical of bilateral monopolies, supervening impossibility provides for little in the way of security of tenure.

Accordingly it is possible that a buyer may be hard hit by a change in circumstance, for example, by a dramatic increase in post-war inflation, and thus find the doctrine of supervening impossibility at his disposal. However, given the all-or-nothing summarily extinctive nature of the latter remedy, he may fear the use of the doctrine more than the price increase itself, because it might thereby terminate a contractual relationship, with respect to which he greatly values and requires continuously to be safeguarded by contract. In this respect, the doctrine of supervening impossibility offers little in the nature of price adaptation.

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which is said to be that a person would be bound by the contract, or bare pact, only where the related circumstances have not changed subsequent to the conclusion of the contract or pact; Visser 1984 *SALJ* 647. Such a *clausula* could be based on an actual supposition in the contract between the parties, viz. that the initial conditions will not change, and thus be of a consensual nature; see here e.g. Van der Merwe et al *Contract* 202-203, 386-387. Alternatively, it could also be regarded as a general *ex lege* term, but this would not seem to have been received into Roman-Dutch or modern South African law; see here Visser 1984 *SALJ* 647 ff; Zimmermann *Obligations* 579-582; Lubbe & Murray *Contract* 773; Zimmermann *Good Faith* 257. It could also be based on a legal fiction; Van der Merwe et al *Contract* 387. The *clausula* lives on, however, in modern form in various foreign jurisdictions; see for example the discussion of German law at 5 4 2 below.

420 See in particular Bell *Long-term Contracts* 214-215, and the discussion of English law under 5 3 below.

5 3 The role of good faith and other adaptation tools employed by the law

The shortcomings of the doctrine of supervening impossibility as an adaptation tool have been indicated above; in the face of a change in circumstance, justice may in many circumstances be better served by a modification of terms and not by total extinction. Nonetheless, it is perhaps the only doctrine existing in South African law which has been developed expressly for the situation of changed circumstances, and with respect to which there is some clarity. This however, is not to say that the law has been passive in developing other methods of ensuring mere modification, and not total extinction. When this has been done however, it has been done indirectly so, and sometimes even dishonestly.

5 3 1 Adaptation: common tools of the trade

Traditionally, South African courts have been reluctant to interfere openly with the private autonomy of the parties to a contract; to do so, would be to make the contract for the parties.[421] Accordingly, aside from the rules relating to supervening physical or legal impossibility (but which only allow for termination), the courts have ostensibly refrained from modifying contracts that come before them, despite, for instance, some change in circumstance. Nonetheless, by way of, for instance, the application of fictions, the use of implied terms, and the readiness of the courts at times to subject the interpretation of contracts to an objective test, or to find for supposedly tacit terms by means of an objective test, South African courts have frequently ensured that contracts are in fact modified so as to result in the just enforcement of contracts.[422] The theoretical basis for this judicial activism is said to be found in the notion of good faith.[423] Furthermore, by fitting such modifications under the guise of well-established legal precepts, the courts thereby continue to maintain that they are not interfering with the autonomy of the parties.[424]

That our courts are habitually if not somewhat dishonestly inclined towards modifying contracts, is well documented. In 1953, for instance, Findlay & Kirk-Cohen revealed much

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421 See the discussion at 1 1 3 above.

422 See e.g. Van Huyssteen & Van der Merwe 1990 *Stell LR* 245; Zimmermann *Good Faith* 242-245.

423 Lubbe & Murray *Contract* 469; Zimmermann *Good Faith* 241, 243.

424 Similar judicial activism is a feature of English law, and finds particular expression in the doctrine of implied terms. Considering that, for example, it was stated in *Techni-Pak Sales (Pty) Ltd v Hall* 1968 3 SA 231 (W), at 236D-E, that the South African and English authorities on implied terms are identical, it is not surprising that judicial activism is a feature common to both. On the covert nature of this type of judicial activism, see the remarks of Lord Denning in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 1 All ER 108 (CA) at 113 (cited also in Zimmermann *Good Faith* 243 n 192). For criticism see *inter alia* Trakman 1983 *Modern Law Review* who at 44 states that '[t]he fictions surrounding the implied terms doctrine grew more extensive in nature as judges sought to objectify the intention of the parties, without, at the same time, admitting to judicial interference with the autonomy of written agreements'. With regard to English law, and the manner in which it has, by way of interpretation, attempted to fulfil the reasonable expectations of contractants, see the recent article by Steyn 1997 *Law Quarterly Review* 433. On implied terms in English law in general, see Guest *Chitty on Contracts* 553 ff.

judicial interpretation in South African courts to be fictitious interpretation.[425] This in turn was not to be regarded as interpretation at all, but judicial modification. The need for fictitious interpretation, the writers stated, usually arises out of some completely unexpected event, and which may cause the contract to operate with gross unfairness in one direction or another. Traditionally, discharge for physical or legal impossibility was to provide for such a turn in events, but that it was clear that justice required in some cases something less than the complete discharge of the contract. Open modification has never been an option for South African courts; accordingly, they seek to modify by way of 'interpretation'. This then is achieved by all manner of means: the generous use of implied terms, assumptions as to the intention of the parties, and the making of equity to 'creep in through the "surrounding circumstances" which did not really surround the parties when they made their contract but were there merely as potentialities of which they were quite unaware'.[426] The writers noted further that while fictitious interpretation had been subject to much criticism,[427] it was at that stage only under such a cloak that the principles of contractual modification were being developed. Accordingly, far from decrying what would one could regard as a dishonest use of judicial power, the writers applauded its use, and with foresight one is now compelled to recognise, suggested that such judicial modification, even under the guise of interpretation, was to be regarded as indication of the road ahead.[428]

Overlapping with, and indeed as part of, fictitious interpretation, is the willingness of our courts to find for tacit terms on the basis of an objective test. Tacit terms, of course, are regarded as the unexpressed provisions of a contract but are derived nonetheless from the common intention of the parties, and are inferred from the express terms of the contract and the surrounding circumstances.[429] Strictly speaking, therefore, a tacit term must represent the actual intentions of the parties, even if this representation is unexpressed (i.e. it is tacit). Frequently however, whilst contracting, the parties lack any particular intention with respect to a set of circumstances, simply because the eventuality of this set of circumstance appearing did not cross their minds. Accordingly, they could hardly be expected to have an actual intention with respect to something which they did not even think about.[430] Accordingly, the test for a tacit term has become objectified. The courts apply the officious bystander test,[431] and the enquiry is no longer necessarily what the parties actually intended but what reasonable parties must be taken to have intended in the circumstances of the case.[432] Thus while the

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425 In their article entitled 'On Fictitious Interpretation' published in that year's edition of the *South African Law Journal.*

426 Findlay & Kirk-Cohen 1953 *SALJ* 147. See also Zimmermann *Good Faith* 243 on judicial activism by way of contractual interpretation. On reconciling party autonomy with fictitious interpretation, see again the remarks of Lord Denning in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 1 All ER 108 (CA) 113.

427 Findlay & Kirk-Cohen 1953 *SALJ* 145.

428 Findlay & Kirk-Cohen 1953 *SALJ* 152.

429 See, typically, *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 3 SA 506 (A) 531-532. Also e.g. Van der Merwe et al *Contract* 197; Zimmermann *Good Faith* 244; Joubert *General Principles* 66 ff; Lubbe & Murray *Contract* 414-419; Hutchison *Wille's Principles* 459-460.

430 Van der Merwe et al *Contract* 198; Vorster 1987 *SALJ* 592-593.

431 On the officious bystander test, see the references cited by Joubert *General Principles* 68-69.

432 See here e.g. *Van der Merwe v Viljoen* 1953 1 SA 60 (A) 65; *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 3 SA 506 (A) 532; *Techni-Pak Sales (Pty) Ltd v Hall* 1968

tacit term must be compatible with any intention revealed expressly in the contract, it is also deduced from such objective criteria as business efficacy and the likely intentions of the reasonable party in those circumstances. Consequently, the courts, to the extent that such modification is reconcilable with, for instance, reasonableness and business efficacy, has a certain leeway to vary.[433]

It should be clear therefore how the courts, through interpretation and the finding for tacit terms, may choose to modify the terms of a contract. It is possible to conceive therefore of the situation where a court may find for a tacit term permitting renegotiation of price, and final third party arbitration on failure of the latter, in the event of a dramatic change in circumstance resulting in a gross imbalance between performance and counter-performance. Nonetheless, the possibility should not be exaggerated; the intention of the parties as expressly stated, or determinable and not merely imputable, remains it seems, the point of departure, and any interpretation with respect to a tacit term, is obliged to take proper recognition of the latter.[434]

Finally, it should also be noted that, potentially, the courts also possess an ability to find for implied or *ex lege* terms in a contract. Implied, or *ex lege*, terms are those unexpressed provisions of a contract that the law itself implies as a matter of course and without reference to the actual intentions of the parties; they do not derive from the consensus (or imputed consensus between the parties in the case of tacit terms) but are imposed from without.[435] Terms which are implied *ex lege* into a contract are also referred to as the *naturalia* of that particular contract. With regard to an implied term or *naturalé* pertaining particularly to changes in circumstances, the *clausula rebus sic stantibus* springs here to mind, although this clause provides traditionally only for termination of obligations, and not mere modification. As indicated earlier, there appears little likelihood of the *clausula* itself being recognised as an implied term within all contracts.[436] Nonetheless, the possibility of the courts recognising as an *ex lege* term, or as a *naturalé* of a certain type of contract, a provision allowing, for instance, for modification of price in the event of a dramatic change in circumstance, does exist. As Zimmermann has noted, existing *naturalia* do not represent a *numerus clausus*, and new *naturalia* may be developed and existing ones extended or restricted so as to adjust the law to changing circumstances.[437]

As stated above, it is said that the principle of good faith may be said to underlie these methods of judicial modification. It is thus necessary to examine the role that the principle of

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3 SA 231 (W); *Van den Berg v Tenner* 1975 2 SA 268 (A). For a crisp exposition of our law on tacit terms see *Wilkins NO v Voges* 1994 3 SA 130 (A), particularly at 136H-137C, and 141C-E.

433 See here in particular the discussion in Van der Merwe et al *Contract* 198-200, and Zimmermann *Good Faith* 244.

434 Van der Merwe et al *Contract* 199. See especially the *caveat* by Nienaber JA in *Wilkins NO v Voges* 1994 3 SA 130 (A), at 141C-E.

435 On terms implied by law see in general Van der Merwe et al *Contract* 196-197; Zimmermann *Good Faith* 245; Joubert *General Principles* 65 ff; Lubbe & Murray *Contract* 422 ff; Hutchison *Wille's Principles* 459. Also e.g. *Minister van Landbou-Tegniese Dienste v Scholtz* 1971 3 SA 188 (A), *A Becker & Co (Pty) Ltd v Becker* 1981 3 SA 406 (A); *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 3 SA 506 (A).

436 See 5 2 above.

437 Zimmermann *Good Faith* 245.

good faith itself might play, that is, outside of the guise of the methods discussed above, in the possible adjustment of contractual terms by the courts. This is accordingly examined immediately below.

5 3 2 Good faith and price adaptation

The majority judgement of the Appellate Division in *Bank of Lisbon & South Africa Ltd v* De *Ornelas*[438] was received critically and controversially;[439] in its wake, nonetheless, was dispatched the *exceptio doli generalis*. The *exceptio* had appeared, to some extent, a suitable remedy where a contract was sought to be enforced under circumstances that were not envisaged at the time the contract was made, and the enforcement of which would result in inequity.[440] As such, it would *prima facie* seem to have possessed some potential as a price adaptation tool.[441] Whereas, however, its demise was much lamented, it is possible a decade later to observe perhaps that its passing has hastened the discussion of the role that good faith might play as a general principle of South African law. We may yet be thankful to the court in *Bank of Lisbon*, for in forcing the legal community to search for alternatives to the *exceptio*, the decision ensured the discussion would happen sooner rather than later.[442] Furthermore, it need hardly be said that a general principle in the form of *bona fides*, with its well-established pedigree in both legal history and modern international law, would prove a far more flexible instrument in the hands of the courts than the *exceptio doli generalis*, whose career in South African law was itself somewhat chequered. Accordingly, the possibility is raised of the principle of good faith serving as a mechanism for price adaptation.

That good faith is regarded today as a highly important concept in the South African law of contract, there can be little doubt. Its presence in our law has been traced many times through both Roman and Roman-Dutch law as well as through decisions of our courts for close on a century.[443] It has been said repeatedly that in modern South African law all contracts are

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438 1988 3 SA 580 (A).

439 For criticism of the decision, and discussion of the *exceptio* (ironically, controversial enough before the *Lisbon* decision), see amongst others Van der Merwe, Lubbe & Van Huyssteen 1989 *SALJ* 235; Erasmus 1989 *SALJ* 676 ff; Lewis 1991 *SALJ* 262 ff; Zimmermann *Good Faith* 254-255; Kerr *Contract* 483 ff, 488 ff; Lubbe & Murray *Contract* 391.

440 See here Lubbe & Murray *Contract* 389. Also Christie *Contract* 18-19 as to its suitability in cases of changed circumstances.

441 This, nonetheless, cannot be overstated. The *exceptio* was essentially a procedural defence, and as such, its effect was to preclude reliance on an agreement. Nonetheless, some commentators did claim that the *exceptio* gave the court an equitable discretion to modify unconscionable contracts; see the references in Lubbe & Murray *Contract* at 390.

442 Note the correct prediction made by Van der Merwe, Lubbe & Van Huyssteen 1989 *SALJ* 242: 'Both judgements in *Bank of Lisbon v Ornelas* have brought South African law to the point where an analysis of *bona fides*, at policy and technical levels, has become unescapable'. Cf. also Christie *Contract* 18.

443 For a recent discussion of the development of good faith in our courts, see the judgement of Olivier JA in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 4 SA 302 (SCA), especially at 318H-324E.

bona fidei, and that good faith is an informing principle of South African contractual law.[444] In the most recent judgement by an appellate judge on the matter, *bona fides* is regarded as applicable within contractual law in that it constitutes ''n onderdeel van die algemeen-geldende openbare belang beginsel'.[445] What is less clear, however, is how it operates and what its precise functions are.[446] No comprehensive treatment of this problem has yet been attempted, and it would seem that at most, this is being attempted by the courts in a piece-meal fashion, and through the framework of existing legal concepts.[447] It has however been said that at the very least, one can be sure that good faith has not yet become a general principle 'allowing courts to alter the agreement of the parties merely because they consider it reasonable to do so'.[448] In the light of this, it would seem that for the indeterminate future, the extent to which the principle of good faith will be allowed to operate so as to permit direct interference by the courts in the operation of contracts will be revealed in a rather casuistic manner. In *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* Olivier AR would have the Supreme Court of Appeal refuse to enforce a contract of surety on the grounds of good faith, the latter seen as an expression of public policy; it may happen, therefore, that at some stage the court goes further and, not being satisfied in merely ensuring that a term of a contract is not enforced, finds in its duty to treat contracts as *bona fidei* the power to modify the contract itself, and thus ensure its continued existence - much, of course, to the horror of party autonomists. This day however has not yet come. Judging by the powers of courts in foreign jurisdictions, this must nonetheless be considered a possibility. The doctrine of *Wegfall der Geschäftsgrundlage*, which serves as an instrument for court-controlled (i.e. *ex lege*) price adaptation in German law, developed precisely from the German courts' extensive interpretation of § 242, that is, the provision in the *Bürgerliches Gesetzbuch* (BGB) requiring contractants to perform in good faith.[449] Consequently, under certain circumstances German courts today are able to adjust terms in contracts, and may thus revise prices hit by unforeseen contingencies. This astonishing development in German legal history did, however, take place in the turbulent hypher-inflationary days of the 1920's, and was accelerated by the legislature's failure to take any action itself. Thus, unless the legislature intervenes and passes legislation along the lines of, for example, art. 6:258 of the Dutch *Burgerlijk Wetboek*

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444 In particular, see the judgements of Jansen JA in *Tuckers Land & Development Corporation (Pty) Ltd v Hovis* 1980 1 SA 645 (A), and *Bank of Lisbon and South Africa Ltd v De Ornelas and Another* 1988 3 SA 580 (A) 611G-617H (minority judgement). See also the following Appellate Division decisions: *Paddock Motors (Pty) Ltd v Igesund* 1976 3 SA 16 (A); *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A); *Mutual & Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 1 SA 419 (A); *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A); *Botha (now Griessel) and Another v Finanscredit (Pty) Ltd* 1989 3 SA 773 (A). As to the opinion of our writers, see especially Zimmermann *Good Faith* 217 ff; also, *inter alia*, Van der Merwe et al *Contract* 230-234; Lubbe 1990 *Stell LR* 7; Carey Miller 1980 *SALJ* 531; Van Huyssteen & Van der Merwe 1990 *Stell LR* 244.

445 *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 4 SA 302 (SCA) 322C, where Olivier JA also remarks that '[d]it blyk ook dat daar 'n innige verband bestaan tussen die begrippe *bona fides*, openbare belang, openbare beleid en *justa causa*'. The judge thereafter refers to certain previous decisions of the Appellate Division in support of this opinion. It appears that little distinction can be made between the above concepts; see Zimmermann *Good Faith* 259 n 326 and the references given there.

446 See the comments by Lubbe in 1990 *Stell LR* 19-20.

447 Van der Merwe et al *Contract* 233.

448 Zimmermann *Good Faith* 241.

449 See the discussion of German law at 5 4 2 below.

(BW),[450] it is likely that the extent to which our courts will judge themselves to be permitted to directly intervene in contracts on the basis of good faith will be revealed in a somewhat more leisurely fashion.

It is submitted, nonetheless, that should such a power be deemed a development worth encouraging,[451] South African law is well-placed. It has only just begun to exploit the rich potential offered by a principle which not only boasts an immaculate South African legal pedigree, but - most usefully- has been the object of extensive examination for many years in many European legal systems. A doctrinal basis for direct judicial modification would thus appear closer at hand than, for instance, in the case of England.[452] Thus it is most significant that a French academic has looked to the possible application of art. 1134 al. 3 of the French Civil Code as a possible solution to the impasse in France where very little provision is allowed for direct adjustment or modification of contracts by the courts.[453]

How, however, court-controlled price adaptation could be attained by the operation of the good faith principle in South African law is not of course clear. On the one hand, on the ground that good faith requires a certain co-operation between parties, a positive obligation of co-operation or collaboration could be held to rest on contractants.[454] Consequently, the parties could be obliged to enter into a period of negotiations with a view to reaching some agreement satisfactory to both. It might then be that a party could be obliged to accept a reasonable price adaptation proposed by the party hit by an unforeseen change in circumstance.[455] If a party refuses to accept such a proposal and insists on performance - which on a strict interpretation of the contract he would be entitled to - this insistence could be regarded as an abuse of right, and not permitted. What the implications of such a finding would then be are uncertain; our law has no theory on the abuse of rights. But perhaps the court would find itself here in the position to adjust the contract, particularly if justified by legislation.[456]

It suffices to say, however, that there does exist the potential in South African law for courts to revise prices. It would of course be a great responsibility of the courts, and would require great trust.[457] Nonetheless, the experience of courts in, for instance, substituting their own price in cases of manifestly unfair prices set by the thirds indicates the task might not be

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450 See the discussion of Dutch law at 5 4 3 below.

451 See the discussion at 5 5 below.

452 See the discussion at 5 4 5 and 5 5 below.

453 De Lamberterie *Long-term Contracts* 234. Article 1134 al. 3 requires all agreements to be performed in good faith; on this impasse, see the discussion of French law at 5 4 5 below. Certain Flemish writers in Belgium appear also to look towards justifying court-effected revision or modification of contracts on the basis of good faith, so as to circumvent the restrictive operation of *imprévision*; Herbots *Contract* 185.

454 See De Lamberterie *Long-term Contracts* again at 234.

455 See here Speidel 1981 *Northwestern University Law Review* 404-405, and e.g. arts. 1467-1469 of the Italian Civil Code.

456 See now, in fact, the South African Law Commission's proposed Bill on the Control of Unreasonableness, Unconscionableness or Oppressiveness in Contracts or Terms, referred to in the final footnote of this chapter.

457 Note the remarks of Van Huyssteen & Van der Merwe in 1990 *Stell LR* 251.

inappropriate.[458] For at present, otherwise, there exists little room for our courts for contractual modification, save where bringing contracts to a complete end (which little serves price adaptation) or under the guise of contractual interpretation.

5 4 Changes in circumstances: a brief comparative synopsis

5 4 1 Introduction

A glance at various European legal systems reveals that, in general, European legal systems have moved a considerable way in creating clear solutions to the problems created by drastic and sudden changes in circumstance, and the consequent upsetting of the balance established at contract between performance and counter-performance. That the origins of the *clausula rebus sic stantibus* may be traced back to the middle ages[459] indicates the problem not to be a new one in the minds of European jurists. It is further interesting to note that many of the solutions to be found in modern European law take the form of a distinct provision in legislation. This is unlike the South African position, where any distinct doctrine concerning adjustment in the light of a change of circumstance cannot be said to exist at all, or at most, has been argued to be an extension of the rules relating to supervening impossibility. Furthermore, the European provisions in question often specifically address the question of contractual performance which has not become (physically or legally) impossible, but 'merely' difficult (though, of course, often where difficult only to some substantial degree), and thus often provide for contractual modification, and not only termination.

5 4 2 Germany

In German law, there is no general provision in the BGB concerning the effect of a fundamental change in circumstance. Rather, the usual basis for relief can today be said to be provided by the doctrine of the collapse of the underlying basis of the transaction (*Wegfall der Geschäftsgrundlage*). While a distinct doctrine in its own right, and a doctrine effectively developed by the German courts, its origins have been said to lie in the so-called corrective function of *Treu und Glauben* (good faith), and accordingly it is still formally treated under the discussion of § 242 (i.e. the general provision on good faith in the BGB).[460] As a modern version of the *clausula rebus sic stantibus*, the doctrine's more recent development may be traced in the Prussian General Land Law of 1794, and in the theories advanced by the Pandectist Bernhard Windscheid, and by Paul Oertmann.[461] It is the latter jurist who has provided modern German courts with a name and language for its interventionist approach, if

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458 See 2 5 4 1 above.

459 See especially Zimmermann *Obligations* 579-582.

460 See here in particular the discussion on good faith in German law by Whittaker & Zimmermann in their introductory chapter entitled 'Good Faith in European Contract Law: Surveying the Legal Landscape' in Whittaker & Zimmermann (eds) *Good Faith in European Contract Law*, forthcoming in early 2000.

461 For a synopsis of the doctrine's development, and for much of the discussion below, see *inter alia* Zweigert & Kötz *Comparative Law* 211-212; Markesinis et al *Obligations* 516-520; Lorenz *Contract Modification* 360-362, 365-375.

not necessarily the substance behind the doctrine.

The doctrine of *Wegfall der Geschäftsgrundlage* may be said to be the consequence of the failure of the drafters of the BGB to include a specific provision on the influence of changes in circumstances. The failure to include such a provision was initially compensated for by an expanded application of the rules in the BGB relating to supervening impossibility of performance. In the period from approximately 1904 until the 1920's, impossibility as found in various articles in the BGB came to encompass not only cases of traditional impossibility but also 'economic impossibility'. Thus a debtor could be released from performance if the supervening event had made performance so difficult that commercial men would regard the extraordinary difficulty as amounting to impossibility, and in another line of decisions from the same period, the *Reichsgericht* (Imperial Supreme Court) permitted release under economic impossibility when to require performance would have been to 'ask too much' (*unzumutbar*). Even the rule that a seller could not be released from his obligations on account of a price increase was qualified when the court allowed for the 'defence of ruination' (*Einrede der Existenzvernichtung*) - that is, when to hold to the original prices would have been to bring about the seller's immediate bankruptcy.[462]

However, it soon became clear that while the concept of economic impossibility had its uses in affording certain relief in the inflation-ridden period of post-War Germany, its usefulness was limited. For in that it was linked to the traditional concept of impossibility, as expressed in various provisions of the BGB, a successful plea invariably resulted in termination of the obligation. Accordingly, in offering only discharge, and not merely adjustment, it failed to offer a party, hard hit by a drastic change in circumstance, the opportunity for relief whilst simultaneously maintaining the contractual bond between the parties.[463] This, of course, and as mentioned above, is precisely the deficiency crippling the doctrine of supervening impossibility in South African law as a possible *ex lege* mechanism for achieving price adaptation under changed circumstances.

Following this dissatisfaction with the concept of economic impossibility (and the fact that it was conceptually too vague), the search for a possible solution was given impetus by the publication in 1921 by Paul Oertmann of his monograph entitled *Die Geschäftsgrundlage; Ein neuer Rechtsbegriff.* Oertmann's theory was first alluded to in a decision of the *Reichsgericht* in 1922, and in the famous landmark case of RGZ 107, 78, which followed the year after. In the latter case, the *Reichsgericht* ordered the owner of mortgaged property[464] to pay to the mortgagee an additional sum over and above the nominal value of the mortgage so as to offset the extraordinary devaluation of paper money which had occurred in Germany following the conclusion of the mortgage contract in 1913. This decision, apart from making reference to Oertmann's theory (and thus ensuring that this theory, even if in name only, would continue to find expression in decisions of the German Supreme Court up until the present), found justification for its abandonment of nominalism, in the final resort, in the

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462 On economic impossibility and the decisions of the *Reichsgericht* during this period, see Zweigert & Kötz *Comparative Law* 212-214; Lorenz *Contract Modification* 365-368; and Markesinis et al *Obligations* 520-523.

463 Markesinis et al *Obligations* 523.

464 Interestingly, the property in question was situated in Luderitz, Namibia, in what was then German Southwest Africa. This is an additional reason for visiting the town.

principle of good faith (*Treu und Glauben*). Thus it stressed that the principle of nominalism was to be disregarded 'if as a result of an especially heavy depreciation of legal tender, not foreseen at the time when the currency regulation was passed [i.e. 1 June 1909], it would lead to results which can no longer be reconciled with § 242 BGB'. Judicial intervention is thus linked directly to the principle of good faith operating in German contractual law. This so-called corrective use of the principle of good faith, arising as it does from as broad and general a statement on good faith as § 242, may well be indicative to South African contractual law, struggling (as it would appear we do) with equally general notions of good faith; admittedly, of course, such notions in South African law are uncodified. Bland it may be, but § 242 has borne much fruit in Germany.[465] Secondly, RGZ 107, 78 stressed that intervention was only justifiable in the most serious of disruptions, and each case was to be judged in the light of its own facts and in accordance with the principle of good faith. The *Reichsgericht* also confirmed that the solution lay in adjustment of the contract, and not in termination, and accordingly sent the case back to the court below with precise instructions as to determining the amount of revalorization. This option continues to be utilised, as German courts held that 'in law it is a basic premise that contracts should be performed'.[466] As later decisions have indicated, this emphasises the belief of the courts that they do not regard themselves as intervening in these cases but merely helping to bring about the natural result of the contract.[467] An order to discharge the contract is, of course, likewise possible; as it has been said, good faith may also require the total release from contractual liabilities.[468]

As mentioned, Oertmann's theory consequently became famous as it was seized upon by the *Reichsgericht* and cited in numerous leading cases thereafter. However, a modern evaluation of the *Wegfäll* doctrine is apt to regard Oertmann's contribution as essentially decorative: he has served to provide the German Supreme Court with phrases to dress up its material findings. Accordingly, modern viewpoints suggest the basis of the doctrine can be found in the courts' allocation of risk between the contracting parties, and this depends very much on the facts of each case.[469] Accordingly, even RGZ 107, 78 tends to be regarded today as primarily of historical significance. However, it is a striking example of a way in which a general provision such as good faith was boldly applied by the courts in order to permit adjustment of contracts hard hit by changes in circumstance.

Thus today German courts continue to approach problems of altered circumstances on the basis of the doctrine of *Wegfall der Geschäftsgrundlage*, irrespective of whether, as has been claimed, this tends to obscure the issue truly being grappled with by the courts, viz. proper

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465 See here the comments of Markesinis et al *Obligations* at 511, and that generality has been its very strength. On the other hand, it has also led to its abuse, particularly during the period of National Socialism. Today, however, it is the fundamental values of the *Grundgesetz* (Basic Law) which permeates the German legal system (including the entire body of private law which is required to be interpreted in the spirit of the fundamental rights), and no longer the fascist ideology of the 1930's and early 40's: see here again the introductory chapter entitled 'Good Faith in European Contract Law: Surveying the Legal Landscape' in Whittaker & Zimmermann *Good Faith*.

466 BGH JZ 1952, 145, 146 (translation supplied in Markesinis et al *Obligations* 528).

467 Markesinis et al *Obligations* 532.

468 BGH MDR 1953, 282 (translation supplied in Markesinis et al *Obligations* at 582).

469 Zweigert & Kötz *Comparative Law* 215; Markesinis et al *Obligations* 519 and the references cited there; and Lorenz *Contract Modification* 370.

allocation of risk.[470] Essentially, the basis of the transaction (*die Geschäftsgrundlage*) consists of those circumstances which (i) have been presupposed by the parties at the time they entered into the contract, which (ii) are so important to one of them that he would not have contracted in their absence, or would have concluded it differently, and (iii) the importance of which the other party would have had, in good faith, to acknowledge.[471] In the event of an unforeseeable change resulting in these circumstances falling away, adjustment or termination is justified. Thus in a contract of sale, a circumstance fundamental to the contract may be that the value of money will not substantially change. In the event of inflation, this value does alter. Normal inflation however, will not allow for adjustment in terms of the doctrine: the change in circumstance (as caused by normal inflation) was foreseeable. In the event of dramatic and unforeseeable inflation following, for instance, an unexpected war, adjustment will be allowed; the change was unforeseeable. Phrased in the language of risk, it would be said here that the balance between performance and counter-performance has been disturbed to such an extent by an unforeseeable event that the change in circumstance can no longer be regarded as being covered by the normal contractual taking of risks by one of the parties: a party would generally not undertake the risk of dramatic and unexpected inflation. By holding him to this risk, his interests are gravely jeopardized; accordingly, adjustment is permitted so as to allow for a proper allocation of risks.

Finally, this is not to say either that by permitting a court to interfere and allow adjustment of a contract makes for ideal price adaptation. Markenisis et al document the considerable burdens placed on the German courts as, in the aftermath of RGZ 107, 78, huge numbers of contracts came up before them for revalorization, that is, contractual modification.[472] Naturally, the solution closer at hand would be a negotiated settlement between the parties before rushing off to court. Nonetheless, in the absence of other self-initiated price adaptation mechanisms, it does allow a party to force the other to court so as to import the necessary adjustment while maintaining their mutual contractual bond. How healthy this contractual relationship would be after each has had his day in court is another question.

5 4 3 The Netherlands

As in the case of the German BGB, the new Dutch *Burgerlijk Wetboek* (BW) contains a so-called good faith clause, viz. art. 6:248, which regulates the legal consequences of contracts by reference to, *inter alia*, good faith (*redelijkheid en billijkheid*). In addition, however, in art. 6:258 it also contains a specific provision dealing with change in circumstances, and which is likewise based upon *redelijkheid en billijkheid.* Article 6:248 (first paragraph) thus provides that the court, at the demand of one of the parties, may modify the effects of a contract or set it aside in whole or in part on the basis of unforeseen circumstances which are of such a nature that the co-contracting party, according to the criteria of reasonableness and equity (*redelijkheid en billijkheid*), might not expect that the contract be maintained in an unmodified

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470 Zweigert & Kötz *Comparative Law* 216.

471 This outline of the doctrine is taken freely from the German report to Case 25 in Whittaker & Zimmermann *Good Faith*. See also, for concise statements in English regarding the essence of the doctrine, Foster *German Legal System* 247, and Schwenzer *Contracts* 181.

472 Markesinis et al *Obligations* 526-528.

form.[473]

It has been noted that the expression 'unforeseen circumstances' should not be interpreted literally. The test is not what circumstances the parties have foreseen or could foresee. Rather, the circumstances are 'unforeseen' when the parties have failed to make provision for the change in circumstances *in their contract*, that is, when the contract itself neglects to make sufficient provision therefor.[474] Where provision has been made, then such circumstances have been made a part of the contractual allocation of risk.[475] Furthermore, modification or the setting-aside of the contract must be effected by the court. A court may attach a condition to its order (e.g. restitution or the payment of a certain amount of money by one party) and the order may be of retroactive effect.

There is, moreover, a certain degree of overlap between art. 6:258 and, for instance, the provisions in the *Burgerlijk Wetboek* concerning impossibility (*force majeure*). The latter provisions follow a more subjective approach to impossibility, that is, a debtor can invoke impossibility following his failure to perform (even where performance was not objectively or absolutely impossible, but merely onerous or difficult), provided this failure to perform did not result from his fault or was at his risk.[476] Thus it may be difficult to distinguish a situation where, as a result of unforeseen circumstances, a party would not expect the contract to be maintained in unmodified form (i.e. art. 6:258), from that situation where performance has become practically too onerous for the debtor as the result of an event not due to his fault, and falling beyond his sphere of contractual risk (impossibility).[477] This of course merely indicates that an increasingly subjective approach to supervening impossibility, as might appear to be the trend in South African law, offers some relief in cases where previously a change of circumstance falling short of objective impossibility would find no relief at all. An approach along the lines of impossibility of course, even if subjective, nevertheless cannot match the price adaptation potential of a clause such as art. 6:258, with its provision for modification.

During the period of post-War 1920's inflation, and in contrast to the position of the German courts, the Dutch Supreme Court (*Hoge Raad*) refused to intervene in cases where as a result of unforeseen circumstances the equilibrium between performance and counter-performance had been gravely upset. Gradually however, and in anticipation of art. 6:258 and the new *Burgerlijk Wetboek*, the court has altered its position.[478] Thus while the *Hoge Raad* has required extreme caution in the application of art. 6:258,[479] the wide, general discretion afforded the courts, with its emphasis on the *redelijke en billijke* expectations of the parties, permits, it would seem, greater opportunity for revision and modification of contracts (and thus court-initiated price adaptation) than, for instance, in the case of Germany.[480]

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473 Hartkamp & Tillema *Contract* 63, 124-125; Fokkema & Hartkamp *Obligations* 97.
474 See in general Hartkamp *Asser's Handleiding* 319-333; also Hartkamp & Tillema *Contract* 63, 125; Fokkema & Hartkamp *Obligations* 97.
475 See e.g. the Dutch report to Case 25 in Whittaker & Zimmermann *Good Faith.*
476 Hartkamp & Tillema *Contract* 120.
477 Hartkamp & Tillema *Contract* 125-126.
478 Hartkamp & Tillema *Contract* 63; Fokkema & Hartkamp *Obligations* 97.
479 Hartkamp *Asser's Handleiding* 319 ff.
480 See here in particular the Dutch report to Case 25 in Whittaker & Zimmermann *Good Faith*, and

5 4 4 The Nordic countries, and Greece, Spain and Italy

The legal systems of the Nordic countries, in particular, Sweden, Finland, Norway and Denmark, are characterised by close co-operation, and together may be said to constitute the distinctive Nordic family of law. A feature of this co-operation is that they share, certainly greatly in substance if not always in interpretation, a joint Contracts Act. This was passed initially in Sweden in 1915, and in later years by the other three states. In this act one finds s. 36, which provides that an agreement may be set aside wholly or in part or may be amended in so far as it would seem unreasonable or in conflict with good commercial practice to invoke it.[481] This provision grants a Nordic court a wide discretion regarding the adjustment of contracts. Thus in the context of inflation-induced price rises, the *travaux préparatoires* indicate that a general change in the balance between performance and counter-performance will not justify adjustment; nonetheless, the inflation need not be unexpected, and thus even 'normal' inflation may at times permit an adjustment, if the effect of the inflation is unreasonable and the parties did not specifically deal with this issue in their contract.[482] Moreover, s. 36 may be used to adjust an indexation or adjustment clause agreed upon by the parties, where this clause is consequently not considered appropriate in the light of the actual changes in circumstance that subsequently occur.[483]

Other jurisdictions permitting modification by the courts in the event of a change in circumstance gravely affecting the equilibrium between performance and counter-performance include Greece, by way of art. 388 of the Greek Civil Code, and Spain, where the High Court, despite a lack of a legislative basis, permits modification under stringent circumstances.[484] In Italy, arts. 1467-1469 of the Italian Civil Code provide for parties engaged in (specifically) long-term contracts and where performance for one of the parties has become excessively onerous due to extraordinary and unforeseeable events. In such a case, a party may demand rescission of the contract, but the other party can avoid this by offering an equitable modification of the terms of the contract. Rescission will also not be granted if the supervening difficulty falls within the normal risks of the contract.[485]

5 4 5 Jurisdictions with little scope for modification by the courts: England and France

Finally, it may be noted that in two major legal systems in Europe, that is, in England and France, very little provision is made for judicial adjustment of contracts in the event of drastic changes in circumstance.

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the observations of Simon Whittaker and Reinhard Zimmermann in the Interim Comparative Analysis to Case 25, ibid.

481 On s. 36 of the joint Nordic Contract Act, and on its application to facts, see the Finnish, Swedish and Danish/Norwegian reports to Case 25 in Whittaker & Zimmermann *Good Faith.*

482 See in particular the Swedish report to Case 25 in Whittaker & Zimmermann *Good Faith.*

483 Ibid.

484 See the Greek and Spanish reports to Case 25 in Whittaker & Zimmermann *Good Faith.*

485 Zweigert & Kötz *Comparative Law* 220; Lorenz *Contract Modification* 363.

In England, provision for changed circumstances in made under the doctrine of frustration. In *Davis Contractors Ltd v Fareham UDC*[486] the House of Lords formulated the test for frustration as being whether the changed circumstances would make performance of the contract 'radically different' from the obligation originally undertaken by the parties. While this test is today also satisfied in conditions other than that those envisaged by factual or legal impossibility, or of frustration of purpose along the lines of the *Krell v Henry* coronation cases,[487] it is still doubtful whether frustration would be found in cases where performance has merely become more onerous or expensive.[488] The point of departure remains that the parties are to look after themselves. In any event, the doctrine of frustration would appear to be of limited use in the context of price adaptation, as it allows only for termination of obligations, and not modification.[489] However, in cases where both parties have committed resources to the continuing contractual relationship, and stand to lose on its termination, the threat of frustration may force the parties to renegotiate and reach a solution themselves.[490] Bell, for instance, states the effect of a frustrating event is to alter the starting points for the renegotiation of terms, and suggests that this is the primary function of the law's intervention (i.e. its threat of termination). Thus in long-term contracts, the threat of termination urges the parties towards new agreement, and this fear-inspired pragmatism is reflected in the paucity of litigation to be found on this issue.[491] This, however, will apply generally only in cases of long-term relationships; that is, where there is no so-called bilateral monopoly, this threat will be felt less.

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486 [1956] AC 696.

487 *Krell v Henry* [1903] 2 KB 740.

488 See the English report to Case 25 in Whittaker & Zimmermann *Good Faith*, for an application of this test. There is, however, some authority that frustration may operate when circumstances change to the extent that prices are driven up to 'unheard of levels': *Tradax Export SA v André & Cie SA* [1976] 1 Lloyd's Rep 416. For a general (and inevitably casuistic) discussion of frustration and its operation, see *inter alia* Guest *Chitty on Contracts* 1016 ff; Furmston *Contract* 574 ff; Treitel *Contract* 778 ff.

489 Treitel, for example, recognises this weakness: *Contract* 781. While frustration brings about the discharge of the obligation, and that accordingly restitution should then result, the Law Reform (Frustrated Contracts) Act of 1943 has granted to the English courts a general, albeit limited, power of adjustment on termination, so as to afford a more equitable restitution. Use of this discretion may at times seem to result in a remedy more akin to modification of an existing contract than to restitution of a discharged contract: thus, in terms of s 1(3), where the court is of the view that one party has partly performed *after* the contract is deemed to have been discharged, it may order the party so benefitted to pay to the performing party a sum which it considers to be just with regard to this part of the performance. Thus, with respect to the price paid for *this* part of the performance (i.e. the part performed, that is, after the contract was held to have ended), the court, by ordering the payment of a reasonable price, has effectively allowed for modification. See further Bell *Long-term Contracts* 214-215. Section 1(2) of the above Act also allows the court, in its reasonable discretion, to deduct from any amount payable by one party as restitution, expenses incurred by that party before the discharge of the contract, and which were incurred for the purpose of performance of the contract. See also Dawson 1982 *Juridical Review* 88-89.

490 See Bell *Long-term Contracts* 214-215. It is perhaps for this reason - that is, that the English approach leads to both parties solving the situation themselves, rather than them making recourse to the courts - that Zweigert & Kötze (*Comparative Law* 227-228) would appear impressed by (as they see it) the realistically commercial solutions reached by the English courts and parties in cases of changed circumstances. See here generally 5 5.

491 Bell *Long-term Contracts* 215.

In French law, the position is likewise restrictive. Since 1876, the *Cour de cassation* has rejected *révision pour imprévision* (doctrine of revision for unforeseeability), holding that it is not the task of courts to modify private contracts (that is, in circumstances not justifying termination in terms of *force majeure*), no matter how equitable this might appear to be.[492] An exception to this was established, however, by the French administrative courts in 1916, where *imprévision* was permitted in the case of a contract where a public service was at stake. In strict private law, however, the position remains restrictive. Businessmen are accordingly required to provide for themselves the allocation of risk in the event of changed circumstances, or, alternatively, revert apparently to arbitration.[493] The failure of French law to provide for *imprévision* within the sphere of private law has been criticised.[494] There have, moreover, been suggestions that a solution may be found in the application of art. 1134 al. 3 of the French Civil Code.[495]

5 5 A case for price adaptation by the courts?

In this chapter, an examination has been made of the mechanisms provided by the law itself in order to allow for an equitable allocation of risks in the event of changed circumstances, or in the context of sale, in order to provide for price adaptation. In this respect, the role played by the law in various jurisdictions differs greatly, and the position in, for instance, Nordic jurisdictions may be compared with that in South African and English law.

At first glance, it may appear that the situation in England (or South Africa for that mater) should be intolerable: provision is only made for termination in terms of the doctrine of frustration (or supervening impossibility in South Africa), and the parties are expected to provide for price adaptation mechanisms themselves. On the failure of the latter, parties may at most make recourse to frustration; the courts possess no general power of adjustment.[496] This consequence has been criticised;[497] the law here is afforded little role as a fall-back or stop-gap. It has been said, therefore, that there has been revealed

> a serious defect in English commercial law: the inability of courts ... to adapt a contract to uncontemplated fundamental changes of economic, political or social nature, if the parties intend to abide by their contract and to implement it.[498]

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492 Civ. 6 March 1876, *Canal de Craponne*, DP 1976.1.193 note A. Giboulot. See also Nicholas *Contract* 208-210; De Lamberterie *Long-term Contracts* 228-232; Zweigert & Kötz *Comparative Law* 217-220; Lorenz *Contract Modification* 358-360; and the French report to Case 25 in Whittaker & Zimmermann *Good Faith*.

493 Zweigert & Kötz *Comparative Law* 220; Lorenz *Contract Modification* 359-360. For a detailed examination of the options available to French businessmen, see De Lamberterie *Long-term Contracts*, *passim*.

494 See De Lamberterie *Long-term Contracts*, *passim*, and the French report to Case 25 in Whittaker & Zimmermann *Good Faith*.

495 That is, the article providing that contracts 'doivent être exécutées de bonne foi' (that is, should be performed in good faith). See again De Lamberterie *Long-term Contracts* 234.

496 Treitel *Contract* 781; Bell *Long-term Contracts* 214.

497 E.g. Treitel, ibid.

498 Schmitthoff 1980 *Journal of Business Law* 91.

On the other hand, this defect, if it is indeed one, would appear not to be a matter of extraordinary concern for the English lawyer. A reading of Bell indicates that few cases on the issue come up before the courts. Clearly, solutions are being found. Moreover, a lawyer such as McKendrick finds himself in disagreement with this criticism, and in a recent article[499] has argued that in English law there exists little need for judicial modification by the courts in the event of changing circumstances.

McKendrick's arguments against judicial modification are chiefly two. These are (i) that the granting to the courts of a flexible, discretionary power to adapt the contract to meet the new situation would create an unacceptable degree of uncertainty, and (ii), that the courts would be incompetent in their attempts to do so. If there is to be adjustment, this should be provided for by the parties themselves: '[c]ontracting parties and their lawyers then know where they stand'.[500] This certainty is lost where this task is foisted upon the courts,[501] who, moreover, are not trained as businessmen. McKendrick also refers approvingly to the views of Dawson and his analysis of American law,[502] and the notorious attempt by an American court in *Aluminum Company of America (Alcoa) v Essex Group Inc*[503] to adjust the price agreed upon in a contract hit by changed circumstances. Consequently, he places grave doubt upon the competence of the judiciary to engage in such an adjustment.[504] As a further objection, McKendrick raises a question of policy: to permit a party to cry unfair and run off to the court for an equitable adjustment would, not withstanding the objections already raised, also place insufficient weight on the bargain initially struck by the parties.[505]

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499 'The Regulation of Long-term Contracts in English Law', published in Beatson & Friedmann (eds) *Good Faith and Fault in Contract Law* (1995).

500 McKendrick *Regulation* 329. Also 314, 332.

501 That is, perhaps, at least until a significant body of case law has accumulated; see McKendrick's remarks in a slightly different context at ibid., 325. But even here, in the light of the struggle for clarity regarding the doctrine of frustration (or for that matter, supervening impossibility in South African law) McKendrick would no doubt be sceptical of any certainty emerging that could be, at any rate, comparable to the certainty the parties themselves could obtain by the inclusion of their own provisions.

502 Dawson 1982 *Juridical Review* 86.

503 499 F Supp 53 (US Dist Ct, WD Pa, 1980).

504 McKendrick *Regulation* 331. Also 314, 325. For strong criticism of a court's ability to effect revision or modification of contractual terms see Dawson 1982 *Juridical Review* 104-105, and Trakman 1983 *Modern Law Review* 46-47.

505 *Regulation* 314. While this would appear to be an argument based upon the principle of *pacta servanda sunt*, it must also be remembered that contractual adjustment, as performed by the courts or the parties, does not terminate the initial agreement, it merely modifies it. Moreover, while it could then be argued that the modified contract after modification is so different from the initial bargain struck (e.g. the price could now be radically different) that it would appear not to be a case of *pacta servanda sunt*, this outlook might be too superficial. If the *balance* between bargained-for performance and counter-performance which has been upset by the change in circumstance can be regarded as part of the *substance* or *content* of the initial contract, then by later modification, this balance has been restored. Consequently, following modification, a bargain more akin *in substance* to the *initial* bargain, though different in outward form or appearance (e.g. the actual price may now be greatly different), will be enforced, as this balance has been restored. In this sense then, modification adheres to *pacta servanda sunt*.

By contrast, McKendrick places great stock in the abilities of the parties themselves to draw up their own provisions, and he refers to the wide range of sophisticated devices available to them for inclusion in their contracts. He indicates further that English lawyers have substantial experience in their creation and implementation,[506] and suggests that the role of the courts in the context of contractual modification is primarily supportive: no more is demanded of the courts than that they be not too astute in striking out such clauses on the grounds of vagueness.[507] The devices he refers to, and the attitude he requires of the courts shall be referred to later in the study.[508]

Aside from these views, there are other possible pointers to this apparent lack of concern in English law regarding the absence of a provision for express judicial modification, or opposition hereto. Thus, Bell is of the opinion that, in any event, English courts are generally receptive to mechanisms employed by parties to make provision for contingency, and are willing to help if a specified mechanism for dealing with such situations breaks down.[509] McKendrick too is able to point to certain recent decisions which have displayed the kind of interpretative benevolence which he favours.[510] Secondly, by application of the doctrine of implied terms, English courts are able to import reasonable terms into contracts under the so-called presumed intention of the parties, and in this way fill gaps in the contingency planning of parties.[511] For while the well-worn rule is that the English courts will not easily imply a term into a contract, and not simply because it is reasonable to do so, a case such as *Staffordshire Area Health Authority v South Staffordshire Waterworks Co*[512] indicates a more flexible approach to the implication of terms. McKendrick also recognises this possibility.[513]

Furthermore, as Bell points out, the threat of frustration, and resultant termination, encourages parties to enter into renegotiation and make adjustments to the required performances themselves, rather than have discharge foisted upon them by the courts. That such a threat does seem to encourage parties to reach agreement on modification - at least parties involved in long-term relationships - is reflected, says Bell, in the paucity of litigation to be found in English law on this problem.[514] Perhaps even more illuminating, however, is the opinion of English jurists that the possibility of adjustment or modification by the court is even more likely to encourage parties to renegotiate and make the compromising adjustment themselves. The viewpoint of contractants hit by changed circumstances and faced with modification by

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506 See e.g. McKendrick *Regulation* 323.

507 Ibid., at 311, 332-333.

508 As examples of the wide range of devices available to contracting parties to adapt their contract to changing conditions, McKendrick (*Regulation* 322-329) refers to *force majeure* clauses, hardship clauses, and intervener clauses. These and other devices are discussed in Chapter 6 below.

509 Bell *Long-term Contracts* 215. See for instance the helpful attitude adopted by the House of Lords towards price ascertainment mechanisms in *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444, [1982] 3 All ER 1, discussed at 2 5 4 above.

510 McKendrick *Regulation* 317-318 cites with approval, for example, the Privy Council decision of *Queensland Electricity Generating Board v New Hope Collieries Pty Ltd* [1989] 1 Lloyd's Rep 205, and a decision of the New South Wales Supreme Court, viz. *Banque Brussels Lambert SA v Australian National Industries Ltd* (1989) 21 NSWLR 502.

511 Bell *Long-term Contracts* 219.

512 [1978] 1 WLR 1387.

513 McKendrick *Regulation* 313 n 28.

514 Bell *Long-term Contracts* 215.

the courts would apparently be: 'We will end up going to court: this is what it will do; let us do the same ourselves'.[515] This seems to support McKendrick's opinion that in England at least, businessmen are not overly confident in the competence of the courts to affect modification.

The position in English law on agreements to agree and agreements to negotiate in good faith has been broadly sketched in **2 6 2 2**. McKendrick, for one, believes that a clause whereby the parties expressly agree, for instance, to renegotiate the contract in good faith in the event of an occurrence which causes exceptional hardship to one of the parties, can serve a very useful purpose.[516] Here the parties *choose* to express themselves in co-operative language; consequently, such a clause should, if possible, be enforced by the courts. As shall be seen in Chapter 7 below, such clauses are already recognised in the form of, for example, hardship clauses. A development, however, which McKendrick refuses to encourage is the possible recognition of any general *ex lege* duty to bargain in good faith. Speidel, for instance, has argued that a party to a long-term supply contract, advantaged by a change in circumstance which has upset the initial bargain struck between the parties, should have a legal duty to accept an 'equitable' adjustment proposed in good faith by the opposite party.[517] McKendrick's difficulty in this lies in how a party could conceivably be in bad faith on the ground that he or she has refused to give up the rights he or she is entitled to in terms of the express provisions of the contract. Perhaps McKendrick's argument is essentially this: 'As parties we can agree to renegotiate a new agreement in good faith. But pray, permit us to agree not to do so too'.

With regard to possible objections to judicial modification that could be grounded in policy, the most frequently encountered one would be that which is raised typically by the party autonomist. The latter might argue that by permitting a court to adapt a contract, the courts can be seen as making the contract for the parties, and that therefore the parties will no longer be responsible themselves for the consequences of their contracts. Furthermore, it could be argued that judicial modification places a premium on lack of awareness or insight, because if judicial revision is permitted, parties who were able to foresee potentially disruptive contingencies and provided against these, are deprived of the benefit of their hindsight.[518] An objection may possibly also be made purely on the grounds of practicability, and specifically within the South African context. As it is, our courts are over-burdened; it might consequently be naive to think that our courts would not be flooded by litigation as parties attempt to escape bad bargains, and that this would not further tax our over-extended system.

In sum, McKendrick's thesis is the following: there is less need to grant the courts a broad power to adjust once it is recognised that the parties themselves - if they take legal advice -

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515 Harris & Tallon *Long-term Contracts* 239-240, reporting on the viewpoints of English participants in a research programme concerning Anglo-French contract law.

516 McKendrick *Regulation* 315.

517 1981 *Northwestern University Law Review* 404-405, and McKendrick, ibid. See now also the South African Law Commission's proposed Bill on the Control of Unreasonableness, Unconscionableness or Oppressiveness in Contracts or Terms, referred to in the final footnote of this chapter.

518 Harris & Tallon *Long-term Contracts* 237.

can make provision in their contract for adjustment.[519] And what of provisions constructed by the parties but which, in the viewpoint of one of the parties, proves to be inadequate in the actual event of a change in circumstance?[520] Or parties who are unable to take legal advice, or who are unduly optimistic, or trusting in the relationship with the other party, and for this reason fail to implement sufficient measures themselves? McKendrick is in such cases adamant: no special provision should be made. The contract remains binding on the terms agreed upon, unless the supervening event is of such gravity that the disturbance qualifies as frustration, or as a supervening impossibility in terms of the South African doctrine. The parties' solution lies in renegotiation.[521] Yet, as already pointed out, in contractual relationships falling outside of so-called bilateral monopolies (and in the absence of the parties' own agreed upon measures), there may be little incentive for one of the parties to renegotiate. As he or she is not utterly dependent on the continuation of the contract, he or she may be quite content to accept termination where the change in circumstance satisfies the requirements of frustration (or supervening impossibility). On the other hand, in circumstances where the circumstances do not satisfy the requirements of frustration, but merely make performance for the other party onerous, the first-mentioned party may insist upon performance, and make no effort to compromise. For if the buyer defaults, the seller sues for damages. This no doubt puts an end to the relationship between them; but then, this relationship may be less important to the party hit to a lesser degree by the change in circumstance. Thus renegotiation is by no means inevitable. Nonetheless, McKendrick maintains that no special provision should be made in the above circumstances. For while he recognises that this may appear unnecessarily harsh he submits that to give the courts a power of adjustment would create too much uncertainty and would entail disadvantages which outweigh the advantages.[522]

5 6 Conclusion

The above chapter has sketched the various provisions provided by the law itself, in various jurisdictions, to provide for contractual modification in the event of changed circumstances. While the discussion has not focused on provisions relating specifically to the modification of price, the provisions referred are often used in this context; accordingly the discussion casts light on price adaptation *ex lege*.

It is, however, important to recognise that while in Chapter 3 a case has been made out for price adaptation, in that it is - in the very least - an ideal often pursued by contractants in practice, it does not necessarily follow that an equal case may be made out for price adaptation affected by the law itself, i.e. *ex lege*. This point has been made strongly by McKendrick, who emphasises the uncertainty that judicial modification brings into the commercial world. On the other hand, the presence of provisions permitting judicial modification in many European legal systems, attests to the acceptance of the courts themselves adjusting contracts under certain circumstances. As has been said by Harris &

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519 McKendrick *Regulation* 329.

520 For example, an agreement to renegotiate in good faith, which though 'implemented', fails to yield results, or where, on the refusal of one party to negotiate, is also found to be unenforceable.

521 McKendrick *Regulation* 331.

522 Ibid., at 332.

Tallon, if the purpose of modification by the courts is to re-establish the contractual equilibrium and not permit one of the parties to profit from a situation which was not foreseen when the contract was signed, then it is the notion of fairness which justifies this role of the courts.[523] This notion of fairness can be seen as fundamental in the justification of many of the modification provisions referred to above.[524]

It is submitted therefore that while McKendrick is correct in identifying the parties as bearing the primary responsibility for contractual adjustment, there may nonetheless be place under certain circumstances for modification by the courts. This is seen if one takes a pragmatic view of the role played by *ex lege* adaptation mechanisms. The role of the courts here is generally a modest one; that is, supportive and supplementary. The point of departure may thus remain that the parties themselves are in the best position to make provision for contingencies.[525] As Zweigert & Kötz state, the reference should always firstly be made to the express contract of the parties.[526] Have the parties themselves expressly allocated the risks, or provided for mechanisms whereby contingency may be satisfactorily provided for? At the same time, however, there is recognition that contractants will not always be able to foresee and predict contingency and provide for appropriate measures, or even if foreseen, it is recognised that it may be too costly, or even impossible, to agree upon their own effective measures, and that, moreover, such measures often fail. Thus the law's role is thus to fill in this gap, to provide a fall-back so as to ensure that the contractual relationship can continue and, following adjustment or modification by the court, in a form providing once more for equilibrium between performance and counter-performance owed by the respective parties.[527] That the courts' role here is primarily supplementary can be seen in the various provisions to be found in overseas jurisdictions providing for judicial modification. In all cases a party has no right to court modification; on the contrary, conditions are always set and the existence of certain factual circumstances always required before the court will intervene. In essence, a threshold is set; a court will not modify before a party demonstrates the presence of these circumstances. While the ease in which these conditions and circumstances may be satisfied varies from one jurisdiction to the other, it is indicative that the solution will normally lie firstly with the parties themselves, before recourse is made to the courts. It is also indicative that *should* the courts in England or South Africa be granted a power to modify contractual terms, it need not necessary comprise the broad, discretionary power which McKendrick seems to fear. A threshold may be set high enough where, whilst demonstrating that it is expected of the parties to provide for the problem themselves and to regard recourse to the courts as a final resort, provision is made nonetheless for judicial modification where not to do so would result in grave inequity. From the observations of McKendrick, it is clear that, in any event, great care should be taken in the setting of any such threshold. In South African

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523 Harris & Tallon *Long-term Contracts* 237.

524 In addition to the position in German, Dutch and Nordic law referred to above, see again De Lamberterie *Long-term Contracts* 234 who finds in art. 1134 al. 3 of the French Civil Code (i.e. the article requiring all agreements to be performed in good faith) a possible solution to the impasse currently found in French law concerning *imprévision.*

525 See here also Trakman 1983 *Modern Law Review* 47-49 who argues strongly that businessmen plan for contingency to a greater extent than is often appreciated.

526 *Comparative Law* 228.

527 Harris & Tallon *Long-term Contracts* 237; Bell *Long-term Contracts* 216; Zweigert & Kötz *Comparative Law* 228.

law, this threshold could be based upon the principle of good faith.[528]

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528 Of very recent significance has been the publication by the South African Law Commission of its proposed Bill on the Control of Unreasonableness, Unconscionableness or Oppressiveness in Contracts or Terms; this was published on the Internet towards the end of 1998, at http://www.law.wits.ac.za/salc.html. Key to this proposed Bill is the proposal that a Court may determine whether contractual terms are unreasonable, unconscionable or oppressive, and thereafter, as a consequence, issue appropriate orders. Appropriate orders clearly make provision for the *ab initio* avoidance of a contract as well as its modification by the court. Of great relevance to price adaptation, however, is the proposed s. 4, which is based substantially on the Commission on European Contract Law's Article 2.117 (for which see Lando & Beale *Principles of European Contract Law* 113). This section does indeed provide for possible modification by the courts in the event of a change in circumstances, but only following an obligatory period of negotiations between the parties, and where the change in circumstances results in performance becoming 'excessively onerous'. Thus it appears the emphasis remains on the parties reaching a solution themselves, whilst likewise, a high threshold would seem to have been set before the contract may in any way be modified by the courts. While this had come too late for substantial discussion in this study, and is by no means yet law, the proposed Bill is undoubtedly a remarkable development; consequently, s. 4 is cited in full:

'4.(1) In the application of this Act the circumstances which existed at the time of the conclusion of the contract shall be taken into account and a party is bound to fulfil his or her obligations under the contract even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance he or she receives has diminished.

4.(2) If, however, performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract or terminating it, provided that:

(a) the change of circumstances occurred after the time of conclusion of the contract, or had already occurred at that time but was not and could not reasonably have been known to the parties; and

(b) the possibility of a change of circumstances was not one which could reasonably have been taken into account at the time of conclusion of the contract; and

(c) the risk of the change of circumstances is not one which, according to the contract, the party affected should be required to bear.

4.(3) If the parties fail to reach agreement within a reasonable period, the court may:

(a) terminate the contract at a date and on terms to be determined by the court; or

(b) adapt the contract in order to distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances; and

(c) in either case, award damages for the loss suffered through the other party refusing to negotiate or breaking off negotiations in bad faith.'

CHAPTER SIX: ADAPTATION TOOLS PROVIDED BY THE PARTIES

6 1 Introduction

Chapter 5 has demonstrated the means by which price adaptation may be effected *ex lege*. In this same chapter, McKendrick was shown to be of the view that - at least in English law - there is no need to imbue the courts with a power to modify contractual terms such as price, as the parties themselves could agree on provisions providing for changes in circumstance. In this chapter therefore, it shall be seen the means by which parties, by the incorporation of particular provisions in their contracts, or by the structuring of their contractual relationship, may themselves provide for price adaptation. The discussion begins thus firstly with the so-called *force majeure* clause, because - as shall be seen - it is possessed with qualities that may be found under a doctrine such as frustration or supervening impossibility, as well as those typical of the most well-known of *ex consensu* price adaptation mechanisms, the price adjustment clause. For while both are the result of agreement between the parties, price adjustment clauses provide more specifically for adaptation, as opposed to the extinction of the obligation, which is normally the consequence of a *force majeure* clause. Accordingly, the discussion moves on to a discussion of the price adjustment clause itself, before analysing in some detail the possibility of price adaptation being effected by a single party in his or her discretion alone. Finally, it shall be seen how the particular contractual relational structure entered into by the parties may import some measure of price adaptation. On conclusion of this chapter, and in view of that already discussed under Chapter 5, an overview will accordingly have been given of the diverse array of methods whereby price adaptation may be achieved, whether *ex lege* or *ex consensu*.

6 2 *Force majeure* clauses

Modern commercial contracts frequently contain so-called *force majeure* clauses, a typical example being the one found in *Channel Island Ferries Ltd v Sealink UK Ltd*:

> A party shall not be liable in the event of non-fulfilment of any obligation arising under this contract by reason of an Act of God, disease, strikes, Lock-Outs, fire, and any accident or incident of any nature beyond the control of the relevant party.[529]

Generally, a *force majeure* clause is a contractual term whereby the parties themselves provide for the situation where performance, subsequent to the conclusion of the contract, becomes impossible owing to some supervening event (i.e. *force majeure*), rather than leaving the consequences of such an occurrence to be determined by the doctrine of supervening impossibility (in South African law) or frustration (in England). The advantage in doing so would be that the application of the latter doctrines by the courts are inevitably characterised by some degree of uncertainty, or are too narrow in scope in application; accordingly, the parties may determine with greater precision when and to what degree a party is excused from

529 [1988] 1 Lloyd's Rep 323.

performance in the event of supervening impossibility, and may thus provide for a very much wider range of circumstances the existence of which would bring the clause into operation.[530]

In general, a *force majeure* clause *excuses* a party from performance; a party hit by an event which in terms of the clause may be regarded as *force majeure* may obtain the right to terminate the contract.[531] Accordingly, the broad remedy afforded by a *force majeure* clause is similar to that provided by the law itself in the doctrines of supervening impossibility and frustration. Accordingly, the observations made with regard to the limitations of the latter doctrines in any price adaptive role apply, in general, likewise here; little further discussion is therefore necessary. It should be recognised, however, that as a *force majeure* clause is the product of the agreement between the parties, the parties may provide for remedies not found in terms of the latter doctrines. Accordingly, as noted by McKendrick, *force majeure* clauses frequently provide for an extension of time in which the performance hit by contingency may be rendered, or may provide for the suspension of the contract for a period before resorting to the more drastic remedy of termination.[532] Such interim relief may afford the necessary opportunity for the parties to restore the equilibrium between performance and counter-performance before the contractual relationship is ended. Accordingly, where a *force majeure* clause does not merely provide for termination, but some measure of adjustment, the distinction between a *force majeure* clause and a hardship clause, as discussed below, may be difficult to draw in practice.[533]

6 3 Price adjustment clauses

6 3 1 Price adjustment clauses: their development from the rule of pretium certum *and their classification*

Price adjustment clauses are perhaps the contractual mechanisms most commonly used by parties to provide for the effects of contingencies on their agreement on price. Typically, they provide for contingencies that may arise during the intervening period of time between the conclusion of contract and the moment of actual performance. In this study, they have been encountered before, but have enjoyed consideration only for the extent to which they have, in the view of the courts, successfully provided for the objective ascertainment of price. Their role as specifically price adaptation mechanisms is examined for the first time in this section. From the fact, however, that they have for many years been under the scrutiny of our courts, indicates the close link between the rule that price, if not immediately certain, may be objectively ascertainable, and the development of techniques to provide for price adaptation.

Following both Bell and De Lamberterie, price adjustment clauses moreover may be divided broadly into two categories, namely those that result in price being adjusted automatically

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530 See the discussion by McKendrick *Regulation* 323-327; Atiyah *Introduction to Contract* 243-244.

531 See e.g. the recent Court of Appeal decision in *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep 1. That the point of departure is excuse, and not modification, see also UNIDROIT art. 7.1.7, and the accompanying commentary.

532 McKendrick *Regulation* 326.

533 See here also Atiyah *Introduction to Contract* 244.

(objective adjustment), and those that require the further decision of the parties (subjective adjustment).[534] This distinction between objective and subjective or party-controlled price adjustment, however, should not be overstated, for as shall be seen, some adjustment clauses comprise both elements. Nonetheless, the distinction is important because in strict law, a clause providing for adjustment of price by one party alone, or on the further agreement of the parties together, will not be permitted. This follows directly from the rule that the determination of price may not be left to the discretion of one of the parties or to his or her nominee (a unilateral power of price adjustment), and nor may it be made dependent upon the later agreement of the parties (the bilateral adjustment of price). Thus particular care is required in drawing up price adjustment clauses where adjustment depends upon further recourse to the parties. In this section, attention is given firstly to the standard price adjustment clause, that is, a clause which generally provides for the automatic adjustment of price. Hardship and intervener clauses are thereafter discussed; these are price adjustment clauses which, whilst making adjustment dependent on further recourse to the parties, are well-recognised in commercial law. Finally, the usefulness of the price adjustment clause is demonstrated in an analysis of an English decision, viz. *Superior Overseas Development Corporation and Phillips Petroleum (U.K.) Co Ltd v British Gas Corporation*,[535] and the discussion concludes with observations on the role played by price adjustment clauses in price adaptation.

6 3 2 The standard price adjustment clause

A price adjustment clause which provides for the automatic adjustment of price constitutes the standard form for price adjustment clauses. As its effect is to set a new price, it follows that, as a general rule, if a price adjustment clause is to be certain of passing the test on certainty of price set down by the courts, it must provide for a price that is objectively ascertainable. Thus the defining characteristic of an objective price adjustment clause, therefore, is that adjustment is calculated by way of reference to an external standard, and not by the further decision of the parties. Adjustment may, for example, be index-based; a price increase (or decrease) may follow on reference to some published price index figure, such as the weekly wage index or the consumer price index.[536] Alternatively, adjustment may be provided for proportional to the relevant manufacturing cost increase of decrease,[537] or may simply be determined by a third party. The contingencies with respect to which adjustment clauses are created are numerous and varied, and include the following: changes to rates of exchange, freight, insurance, landing and clearing charges, taxes and other tariffs and duties, and labour, manufacturing and material costs caused by, for example, the imposition of costly governmental safety and environmental regulations or the rise in price of some commodity.[538]

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534 De Lamberterie *Long-term Contracts* 222; Bell *Long-term Contracts* 203.

535 [1982] 1 Lloyd's Rep 262 (CA).

536 See e.g. *Superior Overseas Development Corporation and Phillips Petroleum (U.K.) Co Ltd v British Gas Corporation* [1982] 1 Lloyd's Rep 262 (CA). Other examples include reference to the English market (*Hill Brothers & Co v Alexander & Jones* (1891) 12 NLR 202) or to the gold price or to some foreign currency (*Multiservice Bookbinding Ltd v Marden* [1979] Ch 84).

537 *Standard Industries Ltd v Marwick* (1920) 41 NLR 83.

538 See e.g. *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* 1964 1 SA 669 (W);

Adjustment clauses are commonly encountered, and the remarks by a party under cross-examination in *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd*,[539] namely, that 98% of that party's clients encountered no problem with the escalation clause included in contracts with that party, indicates possibly how widespread and acceptable they have become in practice. Adjustment clauses, moreover, may be very sophisticated; *Savage and Lovemore Mining (Pty) Ltd v International Shipping Co (Pty) Ltd* contains, for example, a South African example of a very specific price adjustment clause created for the peculiarities of the coal trade.[540]

The construction of an automatic price adjustment clause is, however, from outset a delicate task. This is so in that it presupposes not only that the parties have accurately anticipated the contingencies the contract will encounter, but also that the mechanism invented to provide for such contingencies, namely, the adjustment clause, will do so effectively. American case law, accordingly, contains some dramatic examples of unsuccessful attempts at price adaptation. In *Missouri Public Service Co v Peabody Coal Co*, for example, an index-based price escalation clause failed to reflect radical increases in coal production costs, despite never having failed before, whilst in *Eastern Air Lines v Gulf Oil Co* a price escalation clause failed in a similar manner.[541] The disastrous consequences, on the other hand, of a failure to provide for price adjustment can be seen in the famed Westinghouse uranium saga of the 1970's, where a uranium seller declined to include a price adjustment clause and proceeded to contract on the basis that it would supply uranium over a considerable period of time at the fixed price of approximately $10 a pound. The price of uranium thereafter increased drastically, and the uranium seller stood to lose billions of dollars if held to the agreed price.[542] Furthermore, while McKendrick concedes that it may be very difficult to foresee the precise event which will later prove to disrupt the contract, and thus construct price adjustment clauses around this, he suggests that 'the risk of disruption can be allocated at a broader level of generality'. Thus while one may not foresee the precise cause of an abnormal increase in price (and McKendrick lists here as possible causes hyper-inflation, labour shortages, scarcity of supplies, exchange rate fluctuations, and the outbreak of war), provision may nonetheless be made for any resulting abnormal increase in price, in terms of the contract. If then there is a dispute between the parties as to whether a particular event falls within the definition of 'an abnormal increase in price', and thus whether it triggers off the adjustment clause planned for such circumstances, the parties may turn to the courts for interpretation.[543]

Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd 1986 2 SA 555 (A); *Hill Brothers & Co v Alexander & Jones*, above; and *Savage and Lovemore Mining (Pty) Ltd v International Shipping Co (Pty) Ltd* 1987 2 SA 149 (W). See also Dawson 1982 *Juridical Review* 97-103 for examples from American law.

539 Above, at 574G.

540 1987 2 SA 149 (W) 188I-189F. See also *Cape Provincial Adminstration v Clifford Harris (Pty) Ltd* 1997 1 SA 439 (A) 442F-443D for a further example of a price adjustment clause, although in the context of an engineering contract.

541 583 SW 2d 721 (Missouri Court of Appeals, 1979) and 415 F Supp 419 (US Dist Ct, SD Fla, 1975) respectively. See Dawson 1982 *Juridical Review* 100-101 for a discussion of these cases.

542 For a discussion of this case (the trial court was not required to publish its reasons for its finding that the seller was liable as a settlement was then reached) see Dawson, ibid., at 97.

543 McKendrick *Regulation* 311.

6 3 3 Price adjustment clauses requiring further recourse to the parties

6 3 3 1 Hardship and intervener clauses

The subsection above has looked at price adjustment clauses which, apparently, make do with an entirely objective adjustment of price. Whilst termed the standard form of an adjustment clause, not all price adjustment clauses conform to the latter pattern, and some place greater emphasis on internal adjustment; that is, adjustment effected by the parties themselves. In this regard, a good example is a commonly encountered clause to be found in commercial contracts, viz. the hardship clause.

Typically, a hardship clause will define in general terms what constitutes 'hardship', and will the lay down a procedure to be followed by the parties in the event of such a hardship occurring. The distinguishing feature here is that this will generally entail provision for either party to call for renegotiation of the terms of the agreement, including price, and the consequent imposition of an obligation on both parties to use their best endeavours to renegotiate the contract in good faith in order to alleviate the hardship.[544]

By itself, such a clause could be struck down for uncertainty. Agreements to agree or negotiate are not generally recognised in South African (and possibly English) law.[545] A party may refuse to negotiate or the parties may simply be unable to agree; consequently an adjusted price might never be agreed upon. Accordingly, hardship clauses typically also provide for intervener clauses. These provide for the intervention of a third party (e.g. an arbitrator or a panel of experts) in the case of a failure to agree on an adjustment. Such an intervener clause ensures that a price is indeed fixed and thus rescues the agreement from any possible fatal categorisation as a pure agreement to agree. Moreover it serves likewise as a sanction: should parties fail to reach a new agreement, they know that the issue may be removed from their own hands and that they are then obliged to subject themselves to the decision of another. Such a sanction encourages fresh agreement.[546] Bell would seem to suggest, furthermore, that an intervener clause might provide for the intervention of the courts in a similar manner to, for example, a panel of experts.[547] McKendrick remarks that this is currently not permissible because of the maxim that the courts may not make the contract for the parties, although he finds questionable the distinction between an arbitrator in this role on the one hand, and the court on the other.[548] In such a case, however, public policy possibly dictates that the courts should not be required to play such a role. For while a possible role might be made out for the courts as a final stop-gap determinant of price on the grounds of good faith or fairness where no other provision has been made by the parties for

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544 McKendrick *Contract* 232; McKendrick *Regulation* 330. See also Macneil *Contractual Relations* 64 for his example of a hardship clause incorporated within the development of the relationship between the smelter and the coal merchant, as referred to at 4 2 above.

545 See generally 2 6 2.

546 See the opinions of English jurists referred to above at 5 5 regarding the loss of control over price adjustment to the courts.

547 Bell *Long-term Contracts* 205.

548 McKendrick *Regulation* 319 n 48.

adjustment,[549] this might not necessarily be the case where the parties make express provision for the courts to act as third party intervener. Recourse to the courts should be undertaken as a last resort. Parties should not be encouraged to require specifically the courts to play such a role when alternatives such as arbitrators and experts are clearly within the parties' contemplation; the courts should not be required to carry this additional burden.

The application of hardship and intervener clauses shall be seen in the discussion of the *Superior Overseas* case below. Firstly, however, we note the form of hardship clause suggested by UNIDROIT for inclusion in international commercial contracts.

6 3 3 2 The UNIDROIT Principles

An excellent example of a hardship clause which parties may adopt is to be found in the UNIDROIT Principles of International Commercial Contracts.[550] While art. 6.2.1 provides that where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform, arts. 6.2.2 and 6.2.3 provide an exception in the case of hardship. Article 6.2.2 provides the definition of hardship and is worth citing:

> There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and
> (a) the events occur or become known to the disadvantaged party after the conclusion of the contract;
> (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;
> (c) the events are beyond the control of the disadvantaged party; and
> (d) the risk of the events was not assumed by the disadvantaged party.

Article 6.2.3 thereafter provides for the effects of hardship:

> (1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.
> (2) The request of renegotiations does not in itself entitle the disadvantaged party to withhold performance.
> (3) Upon failure to reach agreement within a reasonable time either party may resort to the court.
> (4) If the court finds hardship it may, if reasonable,
> (a) terminate the contract at a date and on terms to be fixed, or
> (b) adapt the contract with a view to restoring its equilibrium.

It is important to note, firstly, that where the parties adopt a clause such as art. 6.2, the parties may keep as point of departure the approach that despite performance being rendered onerous, the parties remained obliged to perform. It is thus only when the occurrence of events results in hardship as defined in art. 6.2.2 that a party may call for renegotiation and, in the event of

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549 See again 5 5.

550 International Institute for the Unification of Private Law (UNIDROIT) *Principles of International Commercial Contracts*.

this not succeeding, intervention by the court. Furthermore it is clear that the hardship clause suggested by UNIDROIT is not intended to operate where the parties themselves have provided in some other way for the allocation of risk in those particular circumstances (art. 6.2.2(d)). The concept of reasonableness is likewise afforded a significant role, and upon failure of renegotiations, recourse may be made to courts. However, as indicated in the accompanying commentary provided by UNIDRIOT, parties may find it appropriate to adapt the content of the UNIDROIT article to take account of the particular features of their own transactions.[551] Thus provision could be made instead to recourse to arbitrators, especially in the light of any reluctance by the courts to take upon this role where it could be avoided. UNIDROIT art. 6 also provides for termination by the court if necessary, and thus this provision does overlap to some extent with the *force majeure* clause provided by UNIDROIT in art. 7.1.7. However, as noted in Comment 6, the purpose of invoking hardship will be primarily for the renogotiation of contractual terms so as to allow the contract to be kept alive although on revised terms.

6 3 4 Superior Overseas Development Corporation*: price adjustment, hardship and intervener clauses in practice*

6 3 4 1 Introduction

The English Court of Appeals decision of *Superior Overseas Development Corporation and Phillips Petroleum (U.K.) Co Ltd v British Gas Corporation* is a particularly useful judgement with respect to price adjustment clauses.[552] Firstly, it provides valuable insight into the construction of standard price adjustment clauses, as well as with respect to hardship and intervener clauses. Moreover, it indicates why a hardship clause might in certain circumstances be preferred over an automatic price adjustment clause, and, conceivably, *vice versa*. Accordingly, it affords a glimpse of the feelings and fears of contractants stalked constantly by the threat of contingency. An examination of the aspects of the case concerning price adjustment clauses follows in some detail.

6 3 4 2 The facts of the case

On the facts of the case, Superior Overseas (the sellers) entered into a contract of sale for North Sea natural gas with British Gas Corporation for the minimum period of twenty-five years. Article X of the sales agreement provided for periodic price review on the basis of various price adjustment clauses. The first six clauses in Article X created mechanisms which were to offset the effects of inflation on capital and operating costs, and to ensure that the price of natural gas remained competitive in relation to other competing fuels. With respect to inflation, an adjustment of 25% was permitted by reference to three published index figures, namely, wholesale prices, weekly wage rates and capital goods prices. In the event of such a reference proving unsuitable, reference would be made to a committee of experts. Provision was thereafter provided for a review of this adjusted figure, in order to determine whether the adjusted price ensured that gas would maintain a competitive position with respect to its

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551 Comment 7.

552 [1982] 1 Lloyd's Rep 262 (CA).

competitors. Reference to a committee of experts was likewise provided for in the case of dissatisfaction with the review procedure.

Clause 7 of Article X, however, was the primary object of the court's attention. This clause provided that in the event of any substantial change in the economic circumstances relating to the agreement during the contract period, and in the event of either party feeling such change to be causing it substantial economic hardship, then at the request of that party, the parties would meet to consider any possible adjustment to price in fairness to the parties. If, however, the parties had not reached agreement on an adjustment within a certain time period, the issue would be resolved by a committee of experts. In the event, clause 7 was utilised by the parties, but there was no agreement as to what was meant by 'substantial' hardship, and it was with respect to this issue that the parties wound their way to court.

Most interesting, however, are the court's remarks with respect to the various adjustment clauses. The earlier clauses of Article X, the court stated, were concerned with the usual vagaries of the economic situation and for which adjustment adequately could be made. Clause 7, however, was created in order to deal with the 'wild card' of the economic situation, namely, that the parties had failed to foresee some other factor which could serve to falsify the assumptions upon which they were contracting. Consequently they sought to counter such contingency on an *ad hoc* basis by incorporating clause 7, which in the words of Lord Donaldson, constituted the 'ultimate safety net',[553] and with respect to which the court observed the following:

> But the agreement was made to cover a period of 25 years certain and thereafter until determined by notice. It seems probable, therefore, that cl. 7 is designed to adjust price to avoid substantial economic hardship to any party which might arise as a result of substantial economic change which might arise over a period of twenty-five years and which could not be foreseen at the time of making the agreement ... [and] was to deal with those [vagaries of the economic situation] that were unforeseen or unusual and probably not covered by the earlier clauses.[554]

6 3 4 3 The advantages of party-managed price adjustment as revealed in Superior Overseas

The remarks cited above from *Superior Overseas Development Corporation and Phillips Petroleum (U.K.) Co Ltd v British Gas Corporation* indicate the different roles envisaged for the two broadly distinctive types of adjustment clauses, viz. automatic or objective, and subjective or party-managed adjustment clauses. In this respect, the reference to an 'ultimate safety net' is particularly illustrative. It suggests that the price adjustment clause most responsive and reflective to change in circumstance is that in which the role of final determinant, of the precise adjustment to be made, is reserved for the parties themselves. The affording of ultimate control or adaptation of price to the parties (as opposed to the affording

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553 269. Lord Donaldson's judgement is rich in metaphor. At 268 the Lord Justice refers to the effects of inflation and competition as mere 'jokers' in comparison to unforeseen contingency which is regarded as a 'wild card'; at 269 the earlier adjustment clauses are regarded as an 'agreed price autopilot', again in comparison to the 'manual override' of clause 7 which could be invoked in storms of such severity that the autopilot alone could not succeed in keeping the joint venture on course.

554 Per Lord Waller at 265.

of this control to an automatic price adjustment clause) may, in other words, be said to result in the most refined and flexible response to contingency. This, in any event, is the perspective of the two major corporations involved in the *Superior Overseas* case. In their choice of a hardship clause as the ultimate safety net, they indicate that on the failure of standard automatic adjustment clauses to provide adequately for substantial changes in circumstance, they believed they could rely upon an appropriate response being obtained from a renegotiation and agreement on the matter by the parties themselves.

The point is made so as to highlight the advantages to be gained with respect to a more supple, flexible response to contingency. If contingency may be seen as cause for the reconstruction of a term such as price, then an automatic adjustment clause provides for reconstruction in abstract and in advance. Price adjustment afforded in the final instance by one or both of the parties, on the other hand, amounts to reconstruction *on site*: the approach of the party or parties is *ad hoc*; they adapt the price as the contingency materialises, and avoid thus projection into the future. Moreover, automatic price adjustment clauses are, inevitably, the products of the parties themselves. Their inherent flaw lies in their dependence on data, which in turn is provided by the parties themselves. Contractants on the other hand are able to take advantage of other data not possible to be taken into consideration by even the most sophisticated of price ascertainment machinery. One might here refer to the intricate detail of background knowledge known to the parties alone, of previous experience, of observations of business trends, and even the possession of commercial intuition or a 'business nous'.

At **2 6 2 2**, reference was made to developments in English law regarding a more ready acceptance of the agreements to agree or negotiate. Similar developments may follow in South African law. In the meantime it may be recognised that by the incorporation of intervener clauses, parties may, for instance, safely agree to renegotiate price in the event of some supervening event upsetting the equilibrium between performance and counter-performance; for intervener clauses provide the necessary safeguard ensuring the ultimate ascertainment of price in the event of no agreement. Furthermore, definitions of hardship or abnormal increase in price, or whatever concept the parties may wish to use in their hardship clause, may be phrased in broad, general terms. Any dispute therefore as to whether a specific occurrence has indeed resulted in hardship or an abnormal increase in price may be referred to the courts for interpretation. This should not prove unduly difficult for the courts if the parties list typical broadly foreseeable events that, in their view, could result in such a hardship, and then provide in addition a general 'wrap up' provision allowing provision to be made for hardship resulting from similar events.[555] Alternatively, use could be made of the concept of reasonableness, as in UNIDROIT art. 6.2.2. The *Superior Overseas* case demonstrates, in any event, that the courts may undertake this interpretative role, as *in casu*, the actual issue at hand was the interpretation to be given 'hardship'.

Finally, it may be pointed out that in many long-term relationships, and especially those constituting relationships of so-called bilateral monopolies, economic reality dictates that the parties reach agreement.[556] In a relationship such as the one to be found in *Superior*

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555 See here McKendrick *Regulation* at 311 and 326 and the point made above at 5 5 that the risk of disruption can be provided at a broader level of generality.

556 On bilateral monopolies see 3 3 3 above.

Overseas, the parties locked themselves into contractual relationship for a minimum of twenty-five years, in the highly specialised environment of the drilling for, and sale of, North Sea natural gas. Huge costs would be invested by both sides into the performance of highly specialised or idiosyncratic transactions. Should therefore the contractual relationship be broken, both parties may stand to lose heavily: investment costs may not be easily, or even possibly, transferred from one contractual relationship to another. To a greater or lesser degree, parties in such relationships find themselves in a position of mutual dependency. Thus in addition to the sanction provided by an intervener clause (that should they not agree on adjustment, the matter is removed from their control), the need for a relationship based on continued co-operation will often encourage parties to effect the necessary adjustments themselves.

6 3 4 4 Additional South African developments

South African law itself has seen the employment of various mechanisms in order to exploit the advantages to be found in allowing the parties to renegotiate an adjustment in price while remaining on a contractual footing. Thus in *Chelsea West (Pty) Ltd and Another v Roodebloem Investments (Pty) Ltd and Another* a contract of lease provided that after an initial period, the rental payable and annual escalation would be determined by agreement between the parties, and failing such agreement, by an expert (whose appointment in turn was to be agreed upon by the parties, and failing such agreement, by the president of the local Institute of Estate Agents).[557] A similar agreement is to be found in *Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk*, where the court noted that where the agreement to negotiate a fresh rental stood alone, the contract would have been rendered void. However, the clause providing for determination by arbitration on the parties' failing to agree (i.e. an intervener clause) rendered the contract enforceable.[558]

One might finally note again that in *First National Bank of SA Ltd v Transvaal Rugby Union and Another* a clause contained the express provision that following the conclusion of a contract, the parties were entitled to negotiate in good faith to affect further amendments as would be advantageous to both of them.[559] Where agreement however is not reached during the course of the negotiations, the parties would be bound by what was originally agreed upon. While such a clause would offer little in the way of price adaptation (as a failure to agree would result in the continued enforcement of the unadjusted price) it is interesting in its explicit reference to negotiation in good faith.

6 3 5 Price adjustment clauses: the final word

The selection of an appropriate price adjustment clause lies with the parties. In principle, they are encountered in contracts of sale as an extension of the principle that a price need not be immediately certain, but may be also objectively ascertainable. In that they provide for modification of price in the event of contingency, they serve as adaptation mechanisms.

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557 1994 1 SA 837 (C).
558 1993 1 SA 768 (A).
559 1997 3 SA 851 (W) at 856E-F.

Automatic (or objective) price adjustment clauses are frequently encountered and provide for adjustment without the need for further recourse to the parties. Party-managed or subjective price adjustment clauses, on the other hand, tend to be more responsive to changing circumstance in that they provide for adjustment as the contingency arises, and do not rely on adjustment mechanisms that have been constructed in advance of the envisaged contingency. Unless provision is made for the final adjustment of price by objective means (e.g. an intervener clause), this type of adjustment clause may, however, fall foul of the rule that a price must be certain of objectively ascertainable. The mutual dependence of parties engaged in long-term, highly idiosyncratic relationships may, moreover, ensure parties reach agreement themselves on price adjustments.

In the above discussion of subjective or party-controlled price adjustment, the mechanism has been bilateral, that is, both parties adapt price by agreeing on an adjustment. In this regard a hardship clause is a typical example. The question that must follow is whether a power to adjust price may be afforded to a single party alone. Considering the apparently established rule that a party to a contract may not determine price in his or her discretion, this may seem unlikely. Given, however, the manner in which contractants have employed intervener clauses alongside hardship clauses so as to enjoy the adaptation opportunities proffered by the latter, the apparently fixed rule against unilateral price determination may likewise not be insurmountable. The question is, accordingly, whether such a unilateral power of price adjustment has indeed a role to play in price adaptation, and if so, if it may fulfil any such role in a manner and form acceptable to the law. This is examined immediately below.

6 4 The adjustment of price by a party to the contract

6 4 1 Introduction

That a party to a contract may not fix the price himself appears to be a well-established principle of our law. This was indicated in Chapter 2.[560] Moreover, this rule would appear to have a sound basis in both Roman and Roman Dutch law, particularly in Voet 18 1 23, which in turn relies on *Digesta* 18 1 35 1 and *Digesta* 45 1 108 1.[561] The scope of this study does not include an examination of the historical basis of the above rule. However, it must be mentioned that in recent years, the common law basis for the rule against price-fixing by a party to the contract has been the subject of critical scholarship.

Thus in connection with the possible reasons for our common law writers appearing so 'unanimously' in favour of the rejection of unilateral price-fixing powers,[562] Kerr, firstly, states the following with respect to this rule:

> No reason is mentioned in the Roman or Roman-Dutch authorities or in Pothier - the rule is

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560 See 2 6 3 above. See in particular *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 2 SA 555 (A) 574C-D, cited at 2 6 1 above; also reaffirmed more recently in *H Merks & Co (Pty) Ltd v The B-M Group (Pty) Ltd and Another* 1996 2 SA 225 (A) 233I and *Lambons (Edms) Bpk v BMW (Suid-Afrika) (Edms) Bpk* 1997 4 SA 141 (SCA) 158G.

561 For further common law authorities, see Kerr *Sale* 54 n 214.

562 Kerr *Sale* 54-55, 58-59.

> merely stated to be what it is said to be.[563]

Secondly, an incisive analysis of the common law basis of the rule has been made by Lubbe.[564] As a result, *Digesta* 45 1 108 1 is shown to concern the effect on contractual validity of a so-called *si voluero* clause, and thus is shown to have nothing to do with a situation where a party is granted a discretion regarding the *content* of a contract (e.g. the determination of the price), as opposed to where a party is granted a discretion *regarding whether a contract actually exists* (i.e. the proper scope of a *si voluro* clause, and which results in the nullity of the agreement). Lubbe thus demonstrates that there has been a 'misplaaste beroep op die leer oor die *condicio si voluero*' by our common law writers, our courts and our modern commentators.[565]

Thereafter, Lubbe refers to *Digesta* 18 1 35 1, and with regard to the dogmatic basis for this rule, remarks as follows:

> Op gesigswaarde geneem is D 18 1 35 1 [and related common law texts] eenvoudig 'n uiting van die vereiste van *pretium certum*, wat hedendaags na die algemene vereiste dat die verbintenis se inhoud bepaald of bepaalbaar moet wees, herlei sou word.[566]

Thus on Lubbe's reading, the requirement of certainty is regarded as the ratio behind the Roman and Roman-Dutch view. This conclusion should not surprise. The prohibition against the granting to a party to a contract the unilateral power to fix a price has traditionally been regarded as one emanating from the requirement in law that the content of an obligation, including price, be defined with certainty; this has recently and most clearly been indicated again by Corbett JA in the dictum quoted from *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd*.[567] But how or why this link is made is not so clear. Accordingly, the next question Lubbe asks, and indeed this study, is why the rule of *certum pretium* should be such an obstacle to the recognition of unilateral powers in favour of contractants regarding, in particular, the fixing of price. What indeed could be meant by *certum* in this context?

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563 Kerr *Sale* 59.

564 Lubbe 1989 *TSAR* 159. In the first part of this article, Lubbe indicates how case law cited in support of the rule against contractual discretions in favour of a contractant is seldom more than *obiter* in point, and remarks likewise that modern comment on the matter appears generalised (at 160).

565 Lubbe 1989 *TSAR* 165-169. See also Brassey 1992 *AS* 112 as to the authority of our common law writers where, in a discussion of *Genac Properties Jhb (Pty) Ltd v NBC Administrators CC* 1992 1 SA 566 (A), which concerns the possibility of reasonable rent and a unilateral power to fix a part of rent, it was observed that on this issue, the latter writers' view '[was] the product of a very different age', and his suggestion that the fact that the Appellate Division had made no reference to these writers might well be instructive.

566 Lubbe 1989 *TSAR* 170. See also Daube *Certainty of Price* 21, who maintains that there is much to be said for a construction of *Digesta* 18 1 35 1 that does not condemn the sale as invalid if the price was to be fixed by the buyer, which was the usual interpretation favoured by Roman-Dutch writers, but merely provides that the sale is *imperfectum* until the price has been fixed.

567 1986 2 SA 555 (A), cited at 2 6 1 above. See also *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd* 1993 1 SA 179 (A) and the citation from Pothier at 185E-F, where once more the requirement of certainty appears the origin of the rule against unilateral price-fixing.

6 4 2 The effect of a unilateral power to fix price on certainty

There are three possible answers to this question. The first is to interpret certainty, or rather uncertainty, as entailing vagueness. On this interpretation, unilateral price-fixing powers require rejection because they result in the content of an obligation being defined so vaguely that the obligation would accordingly be impossible to enforce.

This interpretation, as justification for the rejection of unilateral contractual powers, has been rightly rejected.[568] A party afforded the unilateral power to determine some aspect of the contractual content, such as price or rent, is in this capacity no different from any other ascertainment mechanism. By the exercising of this power, and accordingly the fixing of some price, precision may be given to the content of the contract. Measured against its ability in ensuring sufficient precision is achieved with respect to the contents of obligations, the appointment of a party to the contract for this task is little, if at all, different to that which can be achieved by a third party appointed to determine a price. In *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd*, Van Heerden JA remarked that (with italics in the original)

> I must confess to some considerable difficulty in grasping why a price (or rent) to be fixed by one of the parties should be regarded as less *certain* than one to be determined by a third party.[569]

The second and third interpretations possible so as to understand the apparent clash between unilateral price-fixing powers and the requirement of certainty have been referred to already.[570] These concern the effect of such powers on the questions as to *whether* a price will in fact be set, and in the event of this occurrence, *what* this price will be.

With regard to the first of the latter two questions it may likewise be shown, in a manner similar to that employed in demonstrating that unilateral price-fixing powers do not necessarily result in unacceptable vagueness of term, that such powers do not necessarily result in a complete and unacceptable lack of certainty as to *whether* a price will indeed be determined. This fear is to no larger extent justifiable here than it is within the context of third party price-setting powers. In principle, the law can be no less sure that it will obtain a price from a third party than it can be sure when requiring this to be done by a party to the contract. While there is some uncertainty with regard to the proper approach of our courts in such cases, this has not prevented the recognition of price-fixing by third parties.[571] In any case, a failure by a party to fix the price when contractually required to do so would amount to breach of contract with a possible claim for damages.

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568 See in particular Lubbe 1989 *TSAR* 171; Kerr *Sale* 58; also Brassey 1993 *AS* 188; Daube *Certainty of Price* 21.

569 1993 1 SA 179 (A). See also the remarks made in *Boland Bank v Steele* 1994 1 SA 259 (T) 274G.

570 See 2 7 above. All three of these questions, of course, correspond to the various meanings which were proposed to be given to certainty; i.e. vagueness (2 7 1), incompletion (2 7 2), and the uncertainty inherent in discretions (2 7 3).

571 See 2 5. See also Lubbe 1989 *TSAR* 175, discussed at 6 4 6 2 below.

Accordingly, the more apparent way in which the word certainty can be linked to a valid rejection of unilateral price-fixing powers, is through recognition of the fact that parties to a contract, and the law itself, cannot be sure, or certain, of the actual monetary amount of the price finally set. This concerns, therefore, the fear of abuse by the party holding such power of the power itself.[572]

It is this fear of abuse that could be regarded, possibly, as a legitimate obstacle to any role to be played by a unilateral price-fixing power in price adaptation. Price may now be adjusted in the event of a contingency, but the party not holding this power cannot apparently be sure if his or her co-contractant will not adjust the price greatly to his or her detriment, and yet hold the adjusted price to be binding. Accordingly, fear of abuse, in the language of price adaptation, concerns *security*.

This problem, however, might also appear more apparent than real. For while important Appellate Division cases such as *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* and *H Merks & Co (Pty) Ltd v The B-M Group (Pty) Ltd and Another*[573] continue to uphold the broad rule against price-setting by parties, there has also appeared alongside a body of case law prepared at most to give effect to merely a *qualified* version of the rule. In doing so, these cases perhaps give an indication that they do not regard the problem of abuse as one that cannot be overcome. Curiously, this body of case law would appear to have developed quietly alongside the more entrenched and well-known judicial statements on this aspect of our law, without overt collision or conflict.[574] In fact, it shall be argued that in the light of recent judgements of the Appellate Division, this new line of thinking has silently surpassed the traditional view, and must now be regarded as the law. And this has been achieved without revision of a *Dawidowitz*, a *Deary* or a *Burroughs*,[575] supposedly traditional bulwarks of the unqualified rule. At the least, it has been a quiet revolution.

However, before examining the developing tendency in case law towards the recognition of only a qualified form of the *Westinghouse* rule, it may be useful to state once more the case for unilateral price-fixing powers as price adaptation tools.

6 4 3 Unilateral price-fixing powers: the case for contractual adaptation

6 4 3 1 Commercially expedient

The usefulness of bilateral price-fixing or adjustment powers as a price adaptation mechanism was discussed under **6 3**. One might assume that this applies equally to where the price-fixing

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572 See Zimmermann *Obligations* 254 as to his opinion that the main objection of Roman lawyers to the unilateral fixing of price by parties was that 'the institutional check against the danger of gross and unreasonable contractual imbalance (namely negotiation about the price) had been removed'.

573 1986 2 SA 555 (A); 1996 2 SA 225 (A).

574 Or likewise, without reference to the analysis by Lubbe in 1989 *TSAR* 159, which would have afforded critical support.

575 *Dawidowitz v Van Drimmelen* 1913 TPD 672; *Deary v Deputy Commissioner of Inland Revenue* 1920 CPD 541; *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* 1964 1 SA 669 (W).

or adjustment power is enjoyed by one party alone. However, one might ask how a power to adjust or fix a price enjoyed by one contractant can ensure an adaptation of price satisfactory to both. In the event of contingency, the party holding this power may make an adjustment satisfactory to him - but can one expect that such an adjustment will result in adaptation satisfactory to them both?

A number of reasons indicate a somewhat different role played by unilateral powers in price adaptation. As one might expect, no one reason alone may be the motivation for a unilateral power, and thus they probably tend to overlap.

Thus firstly, the unilateral power may comprise the final act required for adjustment, and this may only conveniently be performed by one party. An escalation clause, so to speak, can sometimes not do everything. In many cases, a final human act may be required to effect the final price adjustment. One might consider here the escalation clause in *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd*;[576] in the event of a change in manufacturing costs, provision had been made for a price different from the approximate one. But the necessary price change does not follow without more in the event of a change in manufacturing cost; it is in the *necessary* discretion of the seller to establish what this change in manufacturing cost is and apply this to the price.

Very similarly, adjustment may simply be best performed by one party who - alone or to a greater extent - possesses the requisite skill or knowledge, or even the capability, required for the discounting of the effects of the contingency. The lessor in a long-term lease may be more aware of the vagaries of the property market and of increases in rates and property taxes than the lessee; consequently, he may be better placed to adjust rental to reflect the effect of the latter on the balance between performance and counter-performance established by the parties.[577] In the context of sale, similar experience and expertise may be enjoyed by the seller in a scenario such as in *Burroughs*, as pointed out immediately above. Cynically one recognises that this may only be to the extent that that party's performance is detrimentally affected by the contingency. This study does not examine the influence of an imbalance in bargaining power between contracting parties; this understandably may be a frequent explanation for the incorporation of unilateral powers in favour of one party alone, especially in this age of standard form contracts.[578] An obvious example of this is a bank's unilateral power to adjust interest rates; see e.g. *Nedbank Ltd v Capital Refrigerated Truck Bodies (Pty)*.[579] However it may well be that a bank is, in fact, far more responsive and sensitive than its average client to contingencies in the financial markets within which it trades, and is thus better placed to effect adjustments alone. Of course, this raises the issue of controlling such a potentially far-reaching discretion; this, however, is treated later.[580] One might merely observe here, however, that when one considers the highly competitive environment in which banks fight for clients, such a discretion might not appear so obviously prejudicial.

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576 1964 1 SA 669 (W), discussed under 1 2 4 above.
577 See e.g. Otto 1998 *TSAR* 605.
578 See e.g. Van der Merwe et al *Contract* 225 and the accompanying references.
579 1988 4 SA 73 (N). This case is discussed at 6 4 6 1 below, along with a general discussion of unilateral powers within the context of money-lending contracts.
580 At 6 4 6 1.

Added to this, of course, are pragmatic grounds. Aside from purely objective price adjustment mechanisms, the alternative to a unilateral power of adjustment is one requiring the agreement of both parties. This amounts, essentially, to an agreement to agree, and irrespective of the formal objections the courts might in any event make to this, such an agreement will clearly, in some circumstances, not serve the interests of the parties. In the case of adjustment of rates in money-lending contracts, there are for the bank the high costs and impracticability of negotiating and agreeing afresh with all clients upon an increase in rates in the event of a increase in, for example, the repo rate levied by the Reserve Bank.[581] Such costs are inevitably transferred to the client. Likewise one might consider a long-standing relationship between a supplier and a supermarket, with the latter maintaining a standing order for goods with a high turnover. It may be for both parties a highly practical option, and one that ensures an uninterrupted supply, to delegate to the supplier the power to effect adjustments in the light of changes in the market. Moreover, on the occurrence of certain contingencies, time is often of the essence. Adjustment of price may be required to be made immediately, and to obtain agreement may be time-consuming or, at the least, not immediately physically possible.[582] Businessmen may take a pragmatic approach, and prefer to keep a contract on foot, confident of resolving differences *following* performance; ensuring performance, after all, may be at that moment the decisive consideration. In contracts of great complexity, a small difference in price either way may not be of extraordinary significance. The parties concerned may view as a greater achievement the maintenance of the relationship, and the keeping of overall performance on track. Consequently, they may simply wish to remove the adaptation of price beyond the sphere of consensus, realising that agreement on the necessary adaptation may not only be time-consumingly irksome, but not materialise at all.

The grounds listed above are by no means exhaustive; other factors too might motivate parties to agree upon unilateral powers. They do indicate, however, the established role of unilateral powers in modern commerce. There is, however, a further reason why it may be imperative that some form of recognition be given to unilateral powers, and this is perhaps easily overlooked. This concerns the role of a unilateral price adjustment or determination power as a *safety net*, and its importance is demonstrated in *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd.*[583]

6 4 3 2 The Westinghouse *case*

In *Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd*, in a contract involving the supply of trailer braking equipment, the following clauses, as part of the offer to sell which was incorporated as part of the contract, were regarded as terms of the contract:

> The prices quoted are based on ex work costs, transport charges, customs duty and currency

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581 See again Otto 1998 *TSAR* 615-617.

582 See e.g. the facts of *Dickinson & Fisher v Arndt & Cohn* (1909) 30 NLR 172, discussed at 6 4 5 2 below. The purchaser was resident in Natal and the seller was a cement merchant in faraway Hamburg, and at dispute was an increase in price consequent to the San Franciso earthquake of 1906. Perhaps a reflection on the circumstances of a slower age, but nonetheless a suggestion that the physical possibility of immediate agreement on variation should not always be taken as given.

583 1986 2 SA 555 (A).

rates, applicable as at today's date and are subject to escalation.

Clause 3

This tender is based on the rates of exchange, freight, insurance, landing and clearing charges, labour, materials, duties and railway rates ruling on the date of tender. Any alteration to these before the delivery of the goods will be for the account of purchaser, notwithstanding our confirmation of prices in terms of clause 1 above.[584]

Although apparently never fully canvassed,[585] it was apparent that the trial court had difficulties with clause 3 in particular[586] in that it failed to provide a formula which could lead to a mathematical calculation of escalation increases, and thus consequently to a final fixed price. The trial court had stated that there was no clarity as to what proportion of the cost price of the brake kits represented, for instance, the cost of labour or the cost of materials, so that a cost increase suffered by the seller (Westinghouse) with respect to the latter could be objectively converted into an escalated price for the brake kits.

On appeal, this problem was alluded to by Corbett JA. Having set out the law with respect to price-setting,[587] the learned judge of appeal made the *prima facie* observation that this uncertainty surrounding the new escalated price might indeed vitiate the contract of sale in that 'the determination of the amount of escalation might in the last resort be left to the decision of [the seller] (him)self'.[588] Corbett JA, however, noted that this had never been specifically pleaded by the purchaser (Bilger Engineering), and that because it had never been properly canvassed by both sides, the trial court could not be said to have pronounced upon it as an issue. Importantly, the court agreed with Westinghouse that if it had been regarded as a triable issue, Westinghouse as seller would have had to have been given the opportunity to lead evidence to show the clause was 'capable of commercial application and would give rise to a determinable price'.[589] Consequently the court did not regard it as an issue upon which to non-suit the seller.

A glance again at clause 3 might well lead one to agree with Corbett JA that the escalation clause *in casu* appeared, *prima facie* at least, to amount to a unilateral power in favour of Westinghouse - that is, of a discretion or unilateral power being left in the final resort to the seller himself. Some form of discretionary exercise is inevitable if a final price is ultimately to be fixed consequent to some rise in, for example, labour costs. The trial court's analysis is, it is submitted, quite correct in this respect.[590] Thus, as pointed out by Corbett JA, there was

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584 Above, at 566A-D.
585 574I.
586 569B. The trial court apparently also had doubts with respect to another clause, viz. clause 40 of the so-called Armscor conditions; the latter clause would appear to be of similar import to clause 3 quoted above. See here 567F.
587 Namely, that the price may be fixed by the parties agreeing upon some external standard by the application whereof it would be possible to determine the price without further reference to them, and that there can be no valid contract of sale if the parties have agreed that the price is to be fixed in the future by one of them (574C).
588 574H.
589 574J-575A.
590 See also 574E-H where the seller set out how the price was to be determined in practice in the

indeed the danger of the contract being held unenforceable. Can we, however, be so sure that the granting of such a unilateral power was indeed intended by the parties?

On the one hand, there is the view of the seller, Westinghouse. Under cross-examination, the latter admitted that it had not provided for a specific formula for the precise, objective calculation of an escalated price, but nonetheless alleged that '98% of its customers accepted escalation clauses of this nature and were prepared to accept [the seller's] figure of increased costs'.[591]

On the other hand, there are indications in *Westinghouse* that no such contractual discretion was ever intended by the buyer. Corbett JA observed that the trial court had found that the buyer had from outset always wanted a 'definite formula for calculating the escalated prices and was not prepared to leave it to the appellant [Westinghouse] to determine the method of calculation'.[592] The trial court explicitly rejected the seller's testimony that the question of the formula had never been discussed between the parties,[593] or in other words, that the purchaser had not questioned clause 3 and thus consequently could have been held perhaps to have tacitly consented thereto.

Consequently, one may observe as follows: clause 3 amounted either, in the final instance, to the affording to the seller the unilateral power to make a final adjustment to price, or, alternatively, to an attempt by parties to provide for the entirely objective calculation of any price increase. As to which of these alternatives was *intended* by the parties is, even in the case report, uncertain.

The point is, therefore, that there is a fine line distinguishing the two. A price ascertainment mechanism, constructed with the intention that it produce a final fixed price without the further input of the parties, may for some reason fail to prove effective. It is often, however, its very defect that creates the impression that a contractual discretion has been intended in its stead. In *Westinghouse* for example, it is the uncertainty as to the extent to which the price must be adjusted following an increase in a cost component that creates the impression that it is precisely this incident of the contract that has been left to the discretion of the seller, namely, Westinghouse.

This demonstrates that a unilateral power to fix or adjust price may slip in, unnoticed by the parties. This may be as the result of the carelessness of the parties, that is, an oversight on their part. The parties may well have intended a completely objective ascertainment process. On the other hand it may result from the fact that a completely objective ascertainment or adjustment of price may well be, if not nigh impossible, extraordinary difficult to achieve. Ultimately, some form of unilateral act may be required of from a party.

During the course of the trial (and on the 'discretionary' view of clause 3 taken by Westinghouse), it was also claimed that 98% of Westinghouse's clients not only accepted

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event of some increase in cost. The seller in any event admitted (574G) under cross-examination that no specific formula existed for the calculation of the increase per unit (of brake equipment) sold.

591 574G.

592 569C.

593 569C.

escalation clauses of the type in question, but in particular, were prepared to accept Westinghouse's figure of increased costs. *Prima facie* therefore, businessmen of the type dealt with by Westinghouse were not inclined to quibble with the unilateral power afforded to Westinghouse in the final adjustment of price. Of course this may be because they had no reason to; in all cases they may have encountered Westinghouse's adjustments as reasonable. Yet on the strict view that a price may not be fixed by one party alone, these clients could, potentially, all claim their contracts to be void *ab initio*.[594] This is of course quite bizarre.[595] On the other hand, on the view of the respondent, clause 3 does *not* amount to a unilateral power to the seller. On this view, there is nothing at all impermissible about the clause in question. Thus on a small difference of opinion as to fact (with regard to which even the court appeared uncertain), the effect of clause 3 on the enforceability of the contract in general could contrast completely.

Here, therefore, it is clear that some form of recognition should be given to unilateral powers. Their recognition would act as a safety-net for unilateral powers that slip in into contracts, often undetected and unintended. For an unqualified rule in the form of that cited in *Westinghouse* will always present a danger, not only to deliberate attempts to shift some aspect of price determination or adjustment to one of the parties, but also to those genuine attempts to keep price adaptation beyond the sphere of the parties, but which fail in this attempt for some or other oversight. If such a fine line distinguishes these two cases, it is surely not right that the law can attach to them such contrasting consequences.

6 4 4 The qualified rule of Westinghouse *and its relation to* pretium certum

How then may it today be said that the general rule on *pretium certum* as cited in *Westinghouse*, is now a qualified one? This occurs by the observation that case law has recognised the imposition of limits on the extent of the powers granted to either the buyer or seller, and which thus serve to make the unilateral power in question legally acceptable. Broadly speaking, these limits are of two kinds. The first type comprises a broad range of objective factors which, in some way or other, demarcate the parameters within which the unilateral power is to be exercised. The second limit, on the other hand, is an extension of the first. In this form, the demarcating objective factor is not necessarily some expressly created limit by the parties, but the concept of reasonableness itself. Operating together or separately, it will be shown that they comprise the objective limits upon either party's unilateral powers of price determination or adjustment.

The recognition of such factors constitutes, of course, nothing less than the *application of the*

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[594] Cf. *Bonnet en Andere v Snaar Dorpsontwikkelaars (Edms) Bpk en Andere* 1978 4 SA 212 (D) which seems to suggest that by later conduct, a party may waive all rights that may have accrued to it as a consequence of vagueness in a contract, including the right to resile.

[595] See *Enyati Resources Ltd and Another v Thorne NO and Another* 1984 2 SA 551 (C) at 560B where the court stated that '(t)he law, I am inclined to think, might justifiably be labelled an ass were it to strike down as void for vagueness or uncertainty a contract which the parties thereto have fully performed to their mutual satisfaction'. See also e.g. *Nel v Collett* 1943 EDL 5 at 14 on the so-called doctrine of part performance and whether a contract void for uncertainty may be rendered certain by part performance.

general rule regarding price. The general rule regarding price requires that price in a contract of sale, if not immediately certain, must be objectively ascertainable. Objective ascertainment is consequently now placed within the context of unilateral price adjustment powers: the *limits* placed on unilateral price adjustment or determination powers comprise the external standards by which an objective ascertainment of price is possible.

This recognition that the challenge of placing limits upon a unilateral power is really one of determining whether the price can be regarded as objectively ascertainable, can be seen in remarks by Grosskopf AR in *Stead v Conradie en Andere*.[596] In this case, the appellant had argued that an agreement was void because, amongst other arguments, the purchase price for a building had been left to the discretion of one of the parties to the contract, viz. the first respondent. The court found, however, that the provision that the first respondent was to determine the price on the basis of its current value, and that current value normally meant in such a context the market value, meant the price was accordingly objectively ascertainable. Grosskopf AR continued as follows:

> So 'n prysvasstelling was dus nie aan die uitsluitlike diskresie van die eerste respondent, as een van die kontrakterende partye, oorgelaat nie, met die gevolg dat die kontrak nie om daardie rede ongeldig was nie ... Soos in die *Westinghouse*-saak supra op 574C deur Corbett AR opgemerk, kan kontrakterende partye geldiglik ooreenkom 'upon some external standard by the application whereof it will be possible to determine the price without further reference to them'.[597]

Some might find such a link tenuous. Hawthorne, for instance, though by no means critical of the developing recognition of qualified unilateral powers to fix prestation, acknowledges that the courts are 'stretching the limits of the meaning of the term "objectively ascertainable"'.[598] Kerr, moreover, appears to be sceptical of any qualification; he chooses to emphasise that, following *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd*, price must be ascertainable 'without further recourse to [the parties]'.[599] With this focus, however, he perhaps fails to explore the full implications of what it means to require a price to be 'objectively ascertainable'.

How then might one explain the long list of cases which, apparently, have consistently refused to consider any qualified application of the *Westinghouse* rule?[600] Apart from certain suggestions made already,[601] the short answer may be that many of our courts and writers have until recently not looked beyond the power holder. Attention has always been on the fact that *a party* has been afforded the power to determine or adjust price; little attention on the other hand has been afforded to the *extent* of this party's power. Accordingly the act of

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596 1995 2 SA 111 (A).
597 123C-D.
598 Hawthorne 1992 *THRHR* 647.
599 See in particular Kerr *Sale* 36-37 and the doubts he expresses with respect to the correctness of *Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd* 1991 1 SA 508 (A) (discussed below at 6 4 5 3), in the light of rule enunciated in *Westinghouse*.
600 For these cases, see 2 6 3 below.
601 That is, an uncritical reliance on common law authorities, confusion with the *si voluero* clause, and the fact that many decisions - which in turn formed authority for later cases - examined the point merely in *obiter*; see the discussion above at 6 4 1 and Lubbe 1989 *TSAR* 159 in general.

ascertainment may be labelled subjective: the price fixed upon is, after all, ultimately physically decided upon by one of the parties. The manner, however, in which this act of ascertainment is carried out provides the necessary objectiveness; the party exercising the power finds him or herself prescribed by objectively ascertainable limits. Accordingly, price may said to have been - overall - objectively ascertained.

6 4 5 Limitations placed on unilateral powers: the approach of our courts

6 4 5 1 Introduction

In the 1993 Appellate Division case of *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd*,[602] Van Heerden JA, specifically called upon to examine the issue of unilateral powers with respect to the determination of rent, and having made a somewhat brief analysis of common law and case law on this and related points, stated as follows:

> Be all that as it may, I shall assume that we are bound by the views of our old authorities; viz., that a sale (or lease) is invalid if the price (or rent) is to be determined by one of the parties to the agreement. However, the important point for present purposes is that in their reliance on Roman law they go no further than disapproving of a lease where the determination of the rent depends *entirely* on the will of one of the parties ... (italics in the original).[603]

Van Heerden JA, a little later in the judgement, then observed further:

> [that] the rule that the determination of rent - or, for that matter, any prestation - may not be left to one of the parties should be confined to the situation where the determination depends entirely upon the unfettered will of that party.[604]

Here then, at last, was an authoritative qualification on the rule enunciated in *Westinghouse*. Moreover, it is a reasoned conclusion, and forms part of the *ratio decidendi*, and shall require some analysis. Nonetheless, important as the *Benlou* judgement undoubtedly is, it can not properly be said to enunciate new law, or a completely new approach. The belief that it is only unfettered unilateral powers, that is, powers not subject to any objective limitation, that are hit by the rule that a price may not be set by one party alone has been one encountered before in South African case law. This case law, it seems, has been hidden behind better known company such as *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* and *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd*.[605] It is with *Benlou* and other recent cases of the Appellate Division that this approach has now moved out of the shadows. The earlier relatively unappreciated period of case law development receives, however, our initial attention.

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602 1993 1 SA 179 (A).
603 186C-D.
604 186J.
605 1964 1 SA 669 (W); 1986 2 SA 555 (A).

6 4 5 2 Early case law, and the corresponding view of commentators

An early example of a case recognising a limited form of unilateral powers is the old Natal case of *Dickinson & Fisher v Arndt & Cohn*.[606] In this case, in a contract for the sale of cement which was to be shipped from Hamburg to Durban over some considerable period of time, the following words appeared in the margin of the contract form: 'All prices subject to market fluctuations'. After approximately one year after having entered into the contract, the sellers raised the price of cement, as an apparent response to the world-wide increase in the market price of cement following the San Francisco earthquake of 1906. The buyers, accordingly, disputed this increase. The court however held that with respect to the phrase cited, the 'words mean that the price may be increased at the option of the sellers, Arndt & Cohn, upon fluctuation upwards in the market price of cement ...'.[607] It is clear, however, that whilst recognising this power of adjustment in favour of the seller, the court viewed it at the same time as subject to limitations. In this respect, the court appeared to be of the view that before the price could in fact be adjusted, there had to be an increase in market price of cement. This had in fact occurred: the general price of cement had risen following the earthquake. Secondly, it would appear that even if the sellers were entitled to raise the price of cement consequent to a genuine rise in market price, the court was nonetheless of the opinion that such a power was still not unlimited. This follows from the court's remark, although within a slightly different context, that, following adjustment by the sellers, a claim against the buyers could nonetheless be 'for too much'.[608] One may thus conclude that the court did not regard the sellers as having complete *carte blanche*.

There are further a number of other old cases which may lead one to a similar conclusion.[609] *Dawidowitz v Van Drimmelen*,[610] for example, has been identified as the *fons et origo* of the general rule against allowing a party to be unilaterally responsible for the determination of price.[611] But despite some dispute and uncertainty as to how this case should be interpreted,[612] it is, on one interpretation, authority that only completely unfettered

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606 (1909) 30 NLR 172.
607 183.
608 Ibid.
609 Not discussed here but discussed by Lubbe 1989 *TSAR* 164-165 is the 'vergete' *Lichtheim v Stern* 1910 WLD 284. From the facts it appears that it concerned a sale of a business whereby the buyer was granted a discretion to withdraw from a portion of the bargain where he considered the selling price of that portion of the business too high. The court (at 288) held that the seller would be held to the buyer's decision if the latter was exercised *bona fide*. Thus while not specifically concerning a unilateral power or discretion regarding the determination of price (and also somewhat obscure), it is nonetheless an early decision indicating that a seller could be bound to the exercise of a unilateral power (concerning, in fact, an *essentialé* such as part of the *merx*) where prescribed by an objective limitation - in this case, reasonableness.
610 1913 TPD 672.
611 Lubbe 1989 *TSAR* 163.
612 Wessels himself, who as judge gave judgement in the case, would appear to regard the case as a statement of the law concerning the *condicio si voluero*; this would appear from Wessels *Contract* § 433. From the facts of the case, however, this is surely not so: there was no doubt whatsoever as to the *existence* of the obligation between Dawidowitz and Van Drimmelen, and the defendant clearly in no way had a discretion with respect to the continued existence of this. The defendant's discretion, at most, concerned the *content* of the obligation, viz. *when* he was to pay.

discretions should be hit by the rule against unilateral contractual powers.[613] Perhaps if this interpretation had been followed from the start, the case would have avoided being designated poor authority for the general unqualified rule against contractual discretions.[614] For on this view, it was never intended to be authority for the latter.[615] If it can be regarded as authority for a qualified rule on unilateral powers, however, little has been made of it.[616]

A further notoriously difficult case is that of *Dharumpal Transport v Dharumpal*.[617] Again, on one reading of the case in question, it might well serve as some authority for the view that only unfettered unilateral powers should be hit by the rule against price-fixing by parties alone. Whether such a view is plausible, however, depends upon whatever view one takes of *Dawidowitz*, as *Dharumpal* relies for authority upon the former. Nonetheless, the *Dharumpal*

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613 At 676, Wessels J states the following: 'If a person who claims that he has made a contract proves that it depends wholly on his own will what part of it he should perform, then according to my view there is no contract; it is void for vagueness'. Whereas Wessels himself in his book *The Law of Contract in South Africa* would appear to regard this as a statement reflecting on the consequence of a *si voluero* condition (see the footnote immediately above), his statements in *Williams and Taylor v Hitchcock* 1915 WLD 51 at 54, and more particularly the facts of this latter case (and indeed of *Dawidowitz* itself) indicate that this statement of law relates to a discretion or power concerning the *content* of a contract (for example, the price to be paid), and not its very *existence* (which is the aspect of a contract affected by a *si voluero* condition). For in neither *Dawidowitz* nor *Williams and Taylor* might it be said that a *si voluero* type condition or term was involved. It is clear, furthermore, that Hoexter JA in *Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd* 1991 1 SA 508 (A) interpreted *Dawidowitz* as authority for the view that only *completely unfettered* discretions or powers with respect to the *determination of prestation* were to be regarded as void, and accordingly, not as a statement of law regarding the *condicio si voluero*. This would also appear to be the interpretation given it by the court in *Nedbank Ltd v Capital Refrigerated Truck Bodies (Pty) Ltd* 1988 4 SA 75 (N) at 74A-B.

614 See Lubbe 1989 *TSAR* 163.

615 Cases which have - erroneously, it is submitted - relied upon *Dawidowitz v Van Drimmelen* as authority for the general unqualified rule against unilateral powers include the following: *Boland Bank Bpk v Steele* 1994 1 SA 259; *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* 1964 1 SA 669 (W); *Patel v Adam* 1977 2 SA 653 (A); *Leyland SA (Pty) Ltd v Booysen & Clark Motors (Pty) Ltd* 1984 3 SA 480 (W). This may have been done directly or indirectly i.e. by reliance on a case which in turn had relied upon *Dawidowitz*.

616 *Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd* 1991 1 SA 508 (A) 514G-I would appear to be the first case which expressly takes up upon the *Dawidowitz* qualification, and thereafter still be seen to apply it (at 515C-D). On the other hand, it must be acknowledged that *Dawidowitz* is not without fault, and hesitancy in following it is therefore understandable. As Lubbe 1989 *TSAR* 163 points out, the entire case is *obiter* on the issue of unilateral powers, and the judgement of De Villiers JP, furthermore, reveals little of substance. Moreover, on either interpretation, Wessels J can be shown to have misapplied his statement of law to the particular facts: firstly, as pointed out above, it is doubtful whether it could be said that the agreement in question included a *si voluero* condition; alternatively, it is doubtful whether it could be said that the discretion regarding payment was unlimited - agreement that the defendant was to pay 'naar gelang van zaken' clearly constituted an objectively determinable limit. This is recognised by Lubbe 1989 *TSAR* 163. Accordingly, this failure of Wessels J to line up the law as he saw it with the facts at hand must surely be partly responsible for the confusion and wariness with which the case is regarded - see here, for example, the hesitancy of the court in *Humphreys v Cassel* 1923 TPD 280 287 as to the possible correctness of the case.

617 1956 1 SA 700 (A).

case clearly accepts that a contractual discretion or power of some sort might validly be afforded to one of the contractants, with the qualification being that it be exercised reasonably and honestly. From certain later remarks of Hoexter JA, however, the import of which one cannot be entirely certain, it might well be that the judge only recognised the validity of such a discretion when afforded with respect to some non-*essentialé* of the contract, and not when afforded with respect to, for instance, the *merx* or *pretium*.[618]

If this view of qualified unilateral powers may indeed be said to have been the view of Hoexter JA, it was a view shared by others. In an insightful article published in 1965,[619] Davids expressed a proposition with respect to which various courts (including those cited above) had possibly been edging, but had yet to give adequate and clear expression. Accordingly, having drawn from South African and overseas case law and writing, Davids was to state that it was indeed permissible to assign a contractual discretion in favour of one of the parties, provided it was made subject to an objectively ascertainable limitation. This limitation, it was suggested, could even be defined by the concept of reasonableness.

Up until this time, a sharp, incisive analysis of that at issue within the concept of unilateral powers or contractual discretions had been absent in South African law. As indicated in **6 4 1**, Lubbe has demonstrated that while, in a formal sense, there existed good common law authority for the view that contractual discretions led to nullity, such an approach did not convince to any substantive degree.[620] Firstly, our courts, common law writers and modern commentators had mistakenly looked to the *condicio si voluero* construction. Secondly, a basis in the certainty requirement was equally dubious. For as pointed out in **6 4 2**, aside from where reasons of public policy inherent in the latter requirement express concern regarding the *control* of a discretion, it could not be said that the requirement of certainty itself insisted upon nullity as a consequence of contractual discretions.[621] Thus Lubbe criticises writers for their uncritical acceptance of this view,[622] and notes that Wessels is the only writer who examines the issue in depth.[623] Wessels, of course, had raised this very issue in his extra-judicial capacity as author of *The Law of Contract in South Africa*.[624] Having raised various arguments that had been proposed by various German Pandectists[625] in favour of the view that the determination of price may not be left to the discretion of a party, Wessels thereafter noted that it had also been held that the determination of price may be left to a party because

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618 See Hoexter JA's comments at 707D.
619 'Unilaterally Imposed Terms in Contract' 1965 *SALJ* 108.
620 Lubbe 1989 *TSAR* 173.
621 See again Lubbe 1989 *TSAR* 170-171.
622 See the uncritical acceptance of the rule that a price may not be determined by a party to the contract, with no attempt at qualification, in e.g. Mostert et al *Koopkontrak* 11; O'Donovan *Mackeurtan's Sale* 45; Hackwill *Mackeurtan's Sale* 16; Belcher *Norman's Purchase* 66; Van Jaarsveld *Handelsreg* 299. For a list of our Roman-Dutch writers who follow a literal interpretation of *Digesta* 18 1 35 1 (see again the discussion at 6 4 1 above) and who therefore do not recognise that a party may determine price, see Lubbe 1989 *TSAR* 173 n 78. See also Kerr *Sale* 54-55 for the view that Roman-Dutch writers adopted this interpretation.
623 Lubbe 1989 *TSAR* 173.
624 2nd edition by AA Roberts, 1951, at § 430-432. On the views of Wessels, see in general Lubbe 1989 *TSAR* 171-173.
625 Viz., Unterholzner, Maynz, and Arndts, at § 430.

in such a case the discretion must be exercised *arbitrium boni viri*.[626] Nonetheless, Wessels returns to the former view, having been swayed by the view of Voet, who held that price could not be left to the decision of a purchaser or vendor. But Wessels takes up this view with notable tentativeness: for as Voet agreed with the express provisions of Roman law,[627] he explained, it would be 'probably the view which would be adopted by our courts'.[628] This, however, does not convince Lubbe who remarks that Wessels' choice in favour of a standpoint discredited in German law and elsewhere 'berus op blote historiese *pietas* en behoort nie genoeg te wees om ons reg te verbind tot 'n benadering wat histories verdag is en boonop vanuit 'n praktyksoogpunt onbillike resultate gee nie'.[629]

Aside from the views of Wessels,[630] other cases had, prior to the article by Davids, also touched upon the issues of objective limitations and the possible role of, for instance, reasonableness, but without the clarity of the latter article.[631] It is therefore surprising that the views expressed by Davids did not gain greater acceptance or find useful application elsewhere. This however, might also be as a consequence that Davids, whilst exposing the concept of a contractual discretion qualified by objectively ascertainable limitations, proposed one crucial exception:

> There appears to be an exception to this rule, in the case of the *essentialia* of a contract, which must be the subject of *agreement* by the parties. Thus in a sale one party alone cannot fix the price (*Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* 1964 (1) P.H. A19 (W)), since the *essentialia* of the contract are agreement on the price and the thing sold.[632]

As however shall now be seen, recent judgements of our courts have had little hesitation in permitting unilateral powers which, although limited by various standards of objectivity, relate nonetheless also to the *essentialia* of a contract, notably price and rental.[633]

6 4 5 3 Recent judgements of the Appellate Division

A remarkable aspect of recent case law on the subject is that it is characterised by an unexpected forthrightness. Given the issue's history of confusion and uncertainty and an older case law noteworthy for a distinct lack of clarity, it is surprising that case law, especially decisions of the Appellate Division of the 1990's, has tackled the issue with the confidence in which it has done. This is particularly so considering that in this case law, no reference was made to the 1989 *Tydskrif vir die Suid-Afrikaanse Reg* article by Lubbe; this undoubtedly would have rendered critical support. Instructive, however, is that little discussion has been

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626 § 431.
627 Notably, in Wessels' view, *Digesta* 45 1 108 1 and *Digesta* 18 1 35 1.
628 § 432.
629 1989 *TSAR* 173.
630 Whose views on this debate appear not to have been discussed at all in case law.
631 Aside from the decisions already mentioned, see in particular the difficult decision of *Machanick v Simon* 1920 CPD 333.
632 1965 *SALJ* 110; this would appear to be in agreement with the view of Hoexter JA in *Dharumpal Transport v Dharumpal* 1956 1 SA 700 (A) above, and Kerr *Sale* 59.
633 See also the criticism by Lubbe 1989 *TSAR* 173 of this exception made by Davids, and *Nedbank Ltd v Capital Refrigerated Truck Bodies (Pty) Ltd* 1988 4 SA 73 (N) at 74E.

afforded in these cases to their older predecessors. Generally, there has been merely reference to these cases, and not discussion. In the following decisions of the Appellate Division, therefore, one discerns clearly the development towards the recognition of a unilateral power to determine prestation - whether in the form of sale price or rental.

(i) In *Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd* the appellant had obtained from the Development Board of the House of Representatives the exclusive right to develop, service and market erven in a particular area.[634] Thereafter the appellant and respondent entered into a provisional oral agreement recorded later in a letter whereby the respondent obtained the right to build and market houses on the erven concerned. The letter indicated that the price to be paid by the respondent for each erf, once a house had been constructed upon it, would be 'approximately R11 500 to R12 000', and that the exact price was to be determined by the appellant and the Board.[635]

The appellant thereafter repudiated the agreement and was sued for breach of contract by respondent. In its defence, appellant alleged that the agreement between the two parties was void because the amount payable for the erven had not been fixed with certainty, and had been left to the determination of the appellant.[636]

The court affirmed, firstly, what it regarded as undoubtedly a general principle of the law of obligations, namely, that a provision leaving it entirely to the will of a party to an alleged contract 'to determine the extent of the prestation of either party' makes that contract void for vagueness.[637] It thereafter indicated that if the amount payable by the respondent had been determinable in entirety by the appellant, the contract would be regarded as void. *In casu*, however, the court noted that this amount was to be determined jointly by the appellant and the Board. Rephrasing the factual situation in the language of sale, and comparing respondent to party A, and the appellant and the Board to fictional parties B and C, Hoexter JA stated as follows:

> As a matter of principle it is difficult, I think, to see why such a means of determining the price should invalidate the contract. The extent of the buyer's prestation would in that situation not depend wholly upon the will of B; and on the face of things, determination of the price would then involve a reference to an objective and external standard - the conclusion of an agreement

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634 1991 1 SA 508 (A).

635 514A-B.

636 Appellant had originally contended that the contract was one of sale and that accordingly it could not be said that a fixed price had been set. The construction of the contract in question as a contract of sale was, however, rejected by both the court *a quo* and the Appellate Division (see 513A-E). In the alternative, it was argued by the respondent that even if the contract could not be said to be one of sale, the amount payable for the erven was nonetheless a material term of the contract, and that accordingly, it too could not be left to be determined by one of the parties to the contract, and that it had to be determined with certainty. The court accepted that it constituted a material term (515A-B), and by its continued reference, nonetheless, to the law of sale, clearly indicated that on the facts it made no difference whether reference was made to the law of sale on the matter, or the law concerning innominate contracts. Accordingly the case may be cited as authority with respect to powers afforded parties to determine or adjust price.

637 514G-H, relying on *Dawidowitz v Van Drimmelen* 1913 TPD 672 and *Dharumpal Transport v Dharumpal* 1956 1 SA 700 (A).

> between B and C. I say 'on the face of things' because the possibility occurs to me that in practice the answer to the question posed might, in a particular case, hinge upon evidence as to (i) the relationship between the contracting parties, A and B, and (ii) the independence and competence of the third person, C, who is to determine the price jointly with B.[638]

As appellant's defence was one based on exception, the court was content to accept that the Board was such a responsible and independent institution so as to defeat the exception. Moreover, the court was of the view that the power afforded the appellant and the Board was further restricted by the limits indicated in the contract within which the price was to fall (i.e. between R11 500 and R12 000).[639] Accordingly, the provision of a limited price-fixing power to one of the two contractants could not be regarded as fatal to the validity of the contract.[640]

(ii) Somewhat more cryptic is the Appellate Division decision of *Proud Investments (Pty) Ltd v Lanchem International (Pty) Ltd*.[641] In this case, an agreement of lease for a period of six years was entered into between the appellant, as landlord, and the respondent as lessee. In terms of this agreement, the lessee was obliged to shoulder a portion of the reasonable maintenance costs incurred by the landlord during the tenancy of the lease. The agreement furthermore provided that in the event of a dispute between landlord and lessee concerning the reasonableness of such costs, the issue would be decided upon by the landlord's auditors, acting as experts and not as arbitrators, and whose decision was to be regarded as final and binding. In making such a determination, the auditors were to have regard to whether a fair market price had been paid with respect to the costs concerned, and were furthermore entitled to call evidence from suitably qualified persons.

After a period of approximately 16 months, the respondent wrote a letter to the appellant whereby it stated that the lease was void for vagueness and of no force or effect, and therefore no longer binding upon it. In justification for its stance, the respondent contended that, because the portion of maintenance costs to be paid by the lessee constituted rental, the agreement afforded the landlord the right to fix the rent, and accordingly failed to provide for a fixed or (objectively) ascertainable rent. This contention was upheld by the court *a quo*.

The court of appeal, however, found differently. Firstly the court noted that the costs which were to be incurred by the landlord and which were the object of the current dispute had been identified clearly. One assumes that in pointing this out, the court was indicating that in one respect already the landlord's discretion was limited: he had firstly to incur certain specific and identified costs.

Secondly, the court stated as follows:

> The fact that each of the cost items in question is qualified by the word 'reasonable' does not brand them as reasonable *rental*, since clause 9.2 provides the mechanism for the objective determination of the reasonableness 'of any of the operating costs or as to the amount for which

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638 515C-D.
639 515F.
640 See also Hawthorne 1992 *THRHR* 643 for approval of this case.
641 1991 3 SA 738 (A).

> the tenant is liable' by the landlord's auditors as expert outsiders without any reference to the landlord.[642]

By this one assumes that it was the court's view that the discretion was always limited by the fact that a claim could only be made for maintenance costs that had been *reasonably* incurred. This standard was, furthermore, objectively ascertainable because a mechanism had been specifically created to ensure the ascertainment of reasonableness, namely, reference to the landlord's auditors. It is clear, moreover, that the court regarded this mechanism for determining reasonableness as itself objective i.e. as expert outsiders and without any further reference to the landlord.

Accordingly, while somewhat cryptic, *Proud Investments (Pty) Ltd v Lanchem International (Pty) Ltd* is nonetheless authority for the view that, provided it is subject to objective limits, a discretion or power as to prestation may be validly afforded to a party to the contract. Hawthorne, however, criticises the judgement, suggesting that the landlord's auditors can in no way be regarded as constituting objective limitations upon the landlord's discretion, and regards them instead as 'employees' of the landlord. Accordingly, on his view, the rental is effectively set by the landlord himself.[643]

(iii) In *Genac Properties Jhb (Pty) Ltd v NBC Administrators CC (previously NBC Administrators (Pty) Ltd)*,[644] the Appellate Division indicated a preparedness to move decisively beyond the cryptic conclusions in *Proud Investments (Pty) Ltd v Lanchem International (Pty) Ltd* to affirm unequivocally its willingness to embrace unilateral powers with respect to prestation, provided the latter are in fact subject to limitation.

In casu, a written lease provided for payment by the lessee of rent, and in addition, an obligation to pay 'the aggregate of all the landlord's actual and reasonable maintenance and

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642 750J-751A.

643 Hawthorne 1992 *THRHR* 644. It could, on the other hand, be suggested that the reference to 'reasonable maintenance' costs is in itself enough to create the necessary limitation upon the landlord's power. This follows from the view, to be expounded upon presently, that all such powers are, in addition to any other limitations, in any event *ex lege* subject to reasonableness. Accordingly, one could view the reference to the landlord's auditors as unnecessary (that is, if we are to follow Joubert JA's favourable opinion of auditors) as the safeguard of reasonableness already exists (by implication of law or by fact - see the later discussion of *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd* 1993 1 SA 179 (A)). Alternatively, even if one were to adhere to Hawthorne's view of auditors and their perceived partiality, this overriding, ever-present *ex lege* requirement of reasonableness would ensure that the auditors themselves would be obliged to act reasonably at all times, and not exercise their judgement in favour of the landlord. There are, nonetheless, indications that clause 9.2 envisages, in any event, that the auditors were to act reasonably; this is a requirement, incidentally, already demanded of arbitrators and similar third parties (see for example *Mayfair South Townships (Pty) Ltd v Jhina* 1980 1 SA 869 (T)). See also Brassey 1991 *AS* 93-94 who sees this case as a yet a further step towards the recognition of reasonable rental, and that consequently the reference to the clause 9.2 mechanism (the determination of reasonableness by auditors) was a necessary interim measure before the courts could take the next short step forward i.e. the ascertainment of reasonableness by the courts themselves.

644 1992 1 SA 566 (A).

running expenses' in respect to the premises.[645] In disputing the validity of the lease, the respondent, as lessee, contended *inter alia* that because the amount of these expenses had been left, in the final analysis, to be determined by the landlord in his sole discretion, the lease was to be regarded as void.

In the court *a quo*, the trial judge had agreed with this contention. Although specifically identifying the qualification placed on the expenses, namely, that they be actually and reasonably incurred, the court was nonetheless of the view that the discretion afforded the landlord invalidated the lease.

In this respect, Nicholas AJA differed, and sought to place a greater value on the qualification mentioned. Accordingly, the acting judge of appeal stated as follows:

> It is question-begging to say that provided the expenses are actually and reasonably incurred, the landlord can without reference to the tenant determine the amounts recoverable under clause 6. The first qualification is that the expenses should actually be incurred. The amount of these, it is true, is within the control of the landlord. The second qualification is that such expenses should be reasonable - reasonable, that is, in relation to both the nature of the expenses and their amount. That is something which is to be objectively ascertained and is not subject to the will or whim of the landlord. It is therefore wrong to say that under clause 6 the landlord determines the amount of the expenses.[646]

It is clear therefore that the Nicholas AJA was satisfied that the concept of reasonableness, in particular, ensured that the power afforded the landlord could not be abused for the latter's gain. It is clear, moreover, that the court in this case regarded reasonableness as a concept quite capable of objective ascertainment.[647] In this respect, *Genac Properties* moves beyond that intimated by the same court in *Proud Investments (Pty) Ltd v Lanchem International (Pty) Ltd*, where it would appear the court required the presence of some third party (*in casu*, the auditors) to give substance to the concept of reasonableness. In *Genac Properties* the court indicates that this is not necessary, in that it is a concept quite capable of ascertainment in itself. Brassey would seem correct, therefore, in predicting, consequent to the *Proud Investments* decision, that the Appellate Division, within the context of prestation owed to another party, would shortly be prepared itself to shoulder the task of determining

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645 574.

646 579B-C.

647 In addition to the remarks of Nicholas AJA in the citation above, see also his analysis of the problem concerning reasonable rent or price, and his conclusion that the courts have little problem giving effect to the notion of reasonableness (577C- 578F). Accordingly, at 577G, the judge remarked that he found it difficult to see under what principle one could invalidate a sale for a reasonable price, or a lease for reasonable rent. This, however, must be regarded as an *obiter dictum*, as *in casu*, the court was not of the opinion that the case concerned the issue of reasonable rent *per se*; rather it concerned the payment by the lessee of reasonable expenses, and this the court held (578D-E), was objectively ascertainable, and accordingly, not so uncertain an amount so as to render the contract void. This argument (i.e. *uncertainty* regarding rent or the amount to be paid for the maintenance and running expenses) served as an additional ground to that discussed in the main text above (i.e. that of the lease providing for a non-permissible discretion in favour of the landlord) utilised by the respondent.

reasonableness.[648]

(iv) Of the recent Appellate Division decisions on unilateral powers, *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd* is perhaps the most important.[649] As in the *Proud Investments* and *Genac* cases, it concerns provisions in a contract of lease, which purportedly grant to the landlord certain powers with respect to the determination of amounts to be paid by the lessee. Importantly, it is clear likewise, however, that the court in *Benlou* regarded the principles applicable *in casu*, namely, those pertaining to the unilateral determination of rent (or that akin to rent), to be as applicable as to where a discretion or unilateral power had been conferred with respect to price in a sale.[650]

In casu, the lease provided that the lessee was obliged to reimburse the landlord for approximately three quarters of the increase in certain running costs of the premises, including the costs of rates and taxes, wages, repairs, water and electricity, refuse removal and insurance premiums. It was argued on behalf of the lessee, the respondent, that these provisions conferred upon the landlord a discretion with respect to the amount payable as rent by the lessee to the landlord, and that this consequently invalidated the contract. The court *a quo* agreed with this contention.

In reversing this decision, Van Heerden JA, speaking for an unanimous court, stated that the rule that the determination of rent, or of any prestation, may not be left to fall within the power of one of the parties, was to be confined to the situation where the determination depended *entirely* upon the *unfettered* will of that party.[651]

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648 1991 *AS* 94. Brassey was, in this context, actually predicting a willingness of the courts to take upon itself the task of giving substance to a *reasonable rent*. By analogy, however, he could equally have predicted a willingness of the courts to quantify what might constitute a *reasonable limit* upon the unilateral fixing of rent.

649 1993 1 SA 179 (A).

650 See the court's remarks at 185B-C, and thereafter at 186E, where references to rent and price are used interchangeably. As in *Genac Properties Jhb (Pty) Ltd v NBC Administrators CC* 1992 1 SA 566 (A), there was a dispute as to whether the contested expenses could be said to constitute *rent*. In both cases, the court was prepared to assume in favour of the lessee that such amounts did constitute rent (*Genac* at 576H, *Benlou* at 182I). Brassey 1992 *AS* 111, within the context of the *Genac* case, criticises this assumption, suggesting that relevant instead is whether the consideration, however it might be characterised, was sufficiently certain to make the agreement binding in law. Moreover, Brassey questions the willingness of the court in *Genac* (and by extension, likewise *Benlou*) to approach the possibility of contracting on the basis of a reasonable price in the same manner as that done with respect to a reasonable rent: while the two have much in common, they differ in the respect that whereas performance in an invalid contract of sale can normally be reversed (i.e. the goods can be returned), performance by a lessor in a contract of lease, in that it is *consumed* as performance is made (i.e. the leased premises are occupied), cannot be. Accordingly, Brassey would seem to say that the practical need for permitting parties to contract on the basis of a reasonable price, as opposed to a reasonable rent, is less: rather than allowing for a reasonable price, an alternative solution would be simply to order restitution (i.e. the price and goods are returned). See here also Zeffertt 1973 *SALJ* 116-117. Given, however, the complex nature of many sales today, it is questionable whether to order restitution and the return of performance is a helpful or easily accomplished alternative. Moreover, parties in the commercial world are more likely to wish for effect to be given to their agreements, rather than have them terminated.

651 186J.

Van Heerden JA, in reaching this conclusion, makes the most thorough examination of the issue hitherto undertaken by our courts. The judgement however, is not particularly structured; important questions of law are touched upon in various places in the judgement, and invariably returned to, or left hanging. Accordingly, one is obliged to pick and choose from various sections in order to attempt to isolate the conclusions drawn. The remarks below must be seen as a reflection of this attempt.

Firstly, it was noted that Roman-Dutch writers may be read as stating that a price (or rent) may not be fixed by one party alone.[652] Van Heerden JA questioned, however, the apparent basis for this conclusion as one derived from the requirement of certainty, and doubted whether it could be said that price fixed by a party to the contract could be regarded as any less certain than that fixed by a third party.[653] Later in the judgement, reference is made to English law where, although it is recognised that rent must be determined with certainty, it is nonetheless recognised that a party could be afforded the power to determine rent in his or her own discretion.[654] These remarks, accordingly, may be seen as dismissive of any objection raised against discretionary powers by the requirement of certainty (in the sense of vagueness).

Thereafter, and as a second point, the judge of appeal observed that although he was prepared to assume that one was bound by the views of the old authorities (namely, that a sale or lease was invalid if the relevant prestation was to be determined by one of the parties alone), this rule was a qualified one. The old authorities, it was noted, went no further than disapproving of a contract where the extent of prestation depended entirely on the will of one of the parties.[655] Curiously, this is not clearly demonstrated by Van Heerden JA. He does, however, rely on two decisions of the Appellate Division, which, it is submitted, do indeed support such a qualification, although these cases contain likewise little reference to the writings of the old authorities.[656]

As further support for his view that only unfettered discretions were to be hit by the rule, the judge referred to a number of other points. This included a reference to the approach in South African law to pure and mixed potestative conditions, and to the recognition in matrimonial law that consent papers may confer a limited discretionary power upon a spouse to bind his or her partner patrimonially.[657] Thereafter, the court identified the limitations *in casu* which acted to qualify the power vested in the landlord.[658] These numbered three, the first of which was the fact that the landlord could only claim a defined share of the increased costs, namely 74.4%. Secondly, the landlord himself had to incur contractual liability for the increased costs, that is, he had actually to incur the costs and expose himself to a claim from the relevant

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652 185C, based particularly on *Digesta* 18 1 35 1.
653 185B-F.
654 187B-D.
655 186C-D.
656 *Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd* 1991 1 SA 508 (A) and *Theron v Joynt* 1951 1 SA 498 (A).
657 186F-J; 187E-G.
658 Strictly speaking, these qualifications were identified by the court (at 184D-H) before the discussion of the rule on price-fixing.

third parties before he could claim from the lessee. This was a point stressed by the court: a failure by the lessee to pay for his three quarter share of the increased costs and the landlord, when faced by claims from third parties, would be obliged to foot the entire bill. His discretion, accordingly, would not appear so free at all. Finally, a third qualification was noted with respect to a cut-off date which affected which expenses were in fact recoverable.

It would appear that the court regarded these three qualifications as adequate in themselves in effectively limiting the power of the landlord.[659] There are, however, indications that in addition, Van Heerden JA was of the view that the power afforded the landlord was, in any event, qualified by the requirement that this power be exercised reasonably.

Van Heerden JA's views on the role of reasonableness within this context are not entirely clear. The possibility of reasonableness serving as an adequate qualification is first raised when, following the judge's rejection of certainty as a rationale behind the rule, Van Heerden JA stated as follows:

> As a matter of logic it is also not clear to me why the requirement that a third party must act *arbitrio boni viri* - as to which see Voet 18.1.23 and *Machanick v Simon* 1920 CPD 333 at 336-9 - should not also govern the situation where it has been left to one of the parties to determine the price (or rent).[660]

Thereafter the judge showed that an agreement conferring upon a party the right to determine prestation was well recognised in other jurisdictions, and that this acceptance followed from these systems' recognition of the qualifying concept of reasonableness or equity.[661]

The possibility of reasonableness serving as an *ex lege* qualification of a party's power to determine prestation, as it did in these overseas jurisdictions, was, however, not dealt with immediately thereafter. It is only raised again on Van Heerden JA remarking that there existed no reason in policy why a power to determine prestation should be held to invalidate a contract.[662]

In this respect, the court noted that to give effect to such a provision served to give effect likewise to the intentions of the parties, and that this was the policy of our courts. Thereafter, the court distinguished between three situations, and did so as follows:

> An agreement conferring upon A the right to claim from B particularised expenditure incurred by the former may be so worded that the extent, and possibly also the nature, of such expenditure is wholly within A's unfettered discretion. At the other end of the scale the agreement may be so phrased that A is only entitled to recover reasonable expenditure from B; i.e., expenditure which is objectively reasonable ... More usually, however, such an agreement

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659 See here the remarks (183J) of Van Heerden JA with respect to *Genac Properties Jhb (Pty) Ltd v NBC Administrators CC* 1992 1 SA 566 (A), and his observation that, in the latter case, it was not held that in the absence of the second qualification identified by the court (i.e. reasonableness), the first qualification (i.e. expenses to be actually incurred) was by itself unable to stave off a conclusion that the lease was to be regarded as invalid.

660 185G.

661 185G-186A.

662 187J.

> will be subject to a term implied by law; viz., that A must exercise an *arbitrium boni viri* and that B is consequently only liable in respect of expenditure which a reasonable man in the position of A could have incurred.[663]

Brassey accordingly interprets these remarks of Van Heerden JA as holding that, 'though the lessor could decide in its discretion what expenditure to incur, there was an implication (either of fact or law) that it could only seek recompense for such expenses as were reasonable ... [and a]s a result the discretion was not unfettered ...'.[664] If such an interpretation is a correct one, *Benlou Properties* holds forth important implications. It suggests that while a qualification upon a power afforded a party to determine prestation may frequently, by an express or tacit reference to reasonableness, be qualified by the parties themselves (i.e. an implication of fact), this in fact, is not strictly necessary. The power in question will, in any event, be subject to the *ex lege* requirement that it be exercised reasonably; stated differently and within the context of sale, it is an implication of law that a party afforded the power to adjust or determine a price must always do so *arbitirio boni viri*.

This is an attractive conclusion. Moreover, given the court's earlier remarks as to the logic of such a conclusion, and its references to foreign jurisdictions who follow this approach, it may well be the correct one.[665] However, it is conceded that the court does not state this expressly; there is no clear unequivocal statement, as there is to be found in other case law regarding a third party, that a contracting party may himself fix or adjust prestation as he is in any event subject to the *ex lege* requirement that he exercise this power reasonably - *arbitrio boni viri.* Van Heerden JA also made his remarks in the context of a power granted to a party to claim expenditure from the other; as indicated earlier in the judgement, in having to incur expenditure[666] himself there exists in any event certain inherent limitations on his supposedly free discretion.

Furthermore, it appears that while such an *ex lege* implication of reasonableness may 'usually' be the case (that is, where this had not been implied already by the parties, either expressly or tacitly), the court also recognised that in certain circumstances a discretion or power might be so worded that it would fall within the first of the categories mentioned above i.e. fall entirely within the unfettered discretion of one of the parties. The court here appears to be making provision for the case where the parties have made their intentions clear that they do not wish the unilateral power in question to be bound by the requirements of reasonableness. In *Benlou* itself the court indicated a willingness to examine whether the provisions *in casu* were not construed so as destroy any room for the implication of a qualification whereby the landlord was always to exercise his power reasonably.[667] Effectively, the parties in such a case would

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663 187J-188C. As authority for this view, Van Heerden JA cited *Machanick v Simon* 1920 CPD 333; *Dharumpal Transport v Dharumpal* 1956 1 SA 700 (A); *Nedbank Ltd v Capital Refrigerated Truck Bodies (Pty) Ltd* 1988 4 SA 73 (N); *Digesta* 18 1 7 *pr.*; Voet 18 1 23; and the 7th edition of volume two of Windscheid's *Lehrbuch des Pandektenrechts* at 407.

664 1993 *AS* 188.

665 That is, Van Heerden JA's remarks at 185G, repeated in the main body of the text above, that he failed to see why the requirement that a third party should act *arbitrio boni viri* should not also govern the situation where a party to the contract was to determine or adjust the price.

666 See 184D-H, and the discussion above.

667 See respondent's argument at 188C-D.

be excluding by agreement the *ex lege* terms of a contract.[668] Of course, as Van Heerden JA notes, such an agreement may well be contrary to public policy, with the result that the agreement would be void.[669]

All things considered therefore, it would appear that *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd* is authority for the view that in the absence of an intention *not* to be bound by the notion of reasonableness, the courts will permit a contracting party to fix or adjust the price, as - as in the case of a third party - the contracting party will, by way of a term implied by law, be required to exercise this power reasonably.[670] In *Benlou*, there are indications that our law is approaching that stage of development where it can, like overseas jurisdictions, safely pass through provisions in contracts whereby the power to determine or adjust prestation is afforded to one party alone, confident in the knowledge that, ultimately, the *ex lege* presence of reasonableness will serve to prevent abuse. This, however, has not yet been conclusively shown.

6 4 6 Limitations upon unilateral powers: additional considerations

In the light of the interesting developments in case law as described above, the following points deserve further attention.

6 4 6 1 Developments in money-lending contracts

There have been a spate of recent decisions on contractual terms authorising the unilateral determination of interest rates in money-lending contracts, and this development has since culminated in the publication of a useful article by Otto.[671] Such terms are clearly, to some extent, analogous with those authorising the unilateral determination or adjustment of rent or price. It is thus interesting to note that, initially, this development in money-lending contracts has somewhat mirrored the development in contracts of sale and lease, as sketched above and to be traced in a case such as *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd.*

This development appears therefore, firstly, in *Nedbank Ltd v Capital Refrigerated Truck Bodies (Pty) Ltd.*[672] In this case, it was pleaded in a particulars of claim that an overdraft

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668 See Van der Merwe et al *Contract* 201.

669 188C.

670 For a recent Appellate Division judgement expressly following *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd* 1993 1 SA 179 (A), see *Stead v Conradie en Andere* 1995 2 SA 111 (A) 122J-123D. This case, however, did not touch upon the issue of reasonableness as a qualification upon a unilateral power. At issue, on the other hand, was whether the determination of the price at which a certain building was to be alienated lay within the exclusive discretion of one of the parties to the contract. In terms of the contract, the 'huidige waarde' of the building was to determine the basis of the price, and the court interpreted this as meaning the building's market value. This in turn, the court observed, was objectively ascertainable, and accordingly, served to qualify the power afforded that party. The contract, consequently, could not be invalidated on this ground, a conclusion with respect to which the court relied upon *Benlou.*

671 'Kontraktuele bedinge wat eensydige rentekoersvasstellings deur banke magtig' 1998 *TSAR* 603.

672 1988 4 SA 73 (N).

agreement between a banker and his client included, as either an express or alternatively as an implied term, a provision that it was within the discretion of the banker to increase the rate of interest from time to time. It had then been queried in the court *a quo* whether such a power afforded the banker was enforceable in law. On coming before the Judge President, Milne JP held that the provision in question was valid and enforceable, in that the discretion afforded the banker was not unlimited: firstly, the rate of interest could not exceed the maximum fixed by the Usury Act 73 of 1968, and secondly, it was stated that, in any event, 'the discretion may have to be exercised reasonably in the sense that it must take into account the rate customarily levied by the bank at that particular time in respect of that class of customer'.[673] Milne JP likewise noted that it was for presumably similar reasons that the customary provision in mortgage bonds permitting the mortgagee to increase the rate of interest from time to time up to a stated maximum had never been challenged as being unenforceable.[674] The position that a banker may in his discretion validly fix the rate of interest on overdrawn facilities subject always to it not exceeding the maximum rate permitted by law, has since also been confirmed recently in *ABSA Bank Bpk v Saunders*.[675] The court in this case found this practice to be a long-standing usage of commercial banks.

Milne JP's remark regarding interest charged mortgagors was taken perhaps as a cue, as some years later, such a provision in a contract of mortgage was indeed challenged. In *Boland Bank Bpk v Steele*[676] the court, while specifically disagreeing with the approach taken in *Nedbank Ltd v Capital Refrigerated Truck Bodies (Pty) Ltd*,[677] nonetheless recognised a power granted to a mortgagee to vary the rate of interest and conditions of payment of the mortgage by way of written notice at any time. This conclusion was reached, however, *not* because the court regarded such a power as fettered by an implied requirement of reasonableness, but by way of interpretation. The court appeared to regard itself bound by authority that a discretion granted to one of the parties resulted in the term being deemed vague, and that the contract would consequently be null. As the clause was vague, the court thus felt a question of interpretation arose, and it accordingly chose to follow the rule of interpretation that in interpreting a contract, an approach must be taken that leads rather to validity of the contract than invalidity. Accordingly, the court chose to interpret the clause as including the limitation that the power was to be exercised in a reasonable manner. As this could be tested against rates and practices to be found in the open market, the clause could no longer be declared too vague.[678] Though differing in approach to the *Nedbank* case, it can nonetheless be observed that in the concept of reasonableness the court in *Boland Bank* also found its way clear to the recognition of a unilateral power to determine interest rates.[679] Developments in the law concerning money-

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673 75C. See the discussion of this case by Lubbe 1989 *TSAR* 173-175 who, while essentially in agreement, points out that, at the time of judgement, there existed little authority in South African case law for the position taken by Milne JP.

674 75D.

675 1997 2 SA 192 (NK) 195-197.

676 1994 1 SA 259 (T).

677 275J.

678 237F-I.

679 Kerr (*Sale* 57) criticises the judgement in *Boland Bank Bpk v Steele* 1994 1 SA 259 (T), stating that there is no precedent case in which the principle of interpretation applied had been held to validate an agreement 'which lacks *consensus* on an essential requirement'. Kerr then goes on to state that if our courts are to regard a reference in a contract to a determination by one of the parties alone of an *essentialé* as a reference to a reasonable determination, than it would be better for this to be laid

lending contracts, and sale and lease, thus appeared to be tracking each other.

Recent decisions in the Witwatersrand High Court, however, appear to reverse this trend. In both *NBS Bank Ltd v Badenhorst-Schnetler Bedryfsdienste BK and Another* and *NBS Boland Bank Ltd v One Berg River Drive CC and Others*[680] this Court held as unenforceable a clause (identical in both cases as clause 14) which provided that the bank could, notwithstanding the original rate of interest fixed elsewhere in the agreement, at any time increase or decrease this rate of interest 'to the rate determined by the bank as payable for the class of bonds into which this bond falls, provided that the rate as increased or decreased does not exceed any limit imposed by any law in force at the time of such increase or decrease'.[681] In the first of these decisions, Stegmann J viewed the loan of a sum of money at interest as analogous with the lease of movable or immovable property, and thus held that an interest rate, as in the case of rental, should either be set by the parties at a particular rate, or be determinable by reference to objectively ascertainable criteria.[682] The judge thus observed that parties could expressly or tacitly provide for the applicable interest rate to be set by law or by custom, or by reference to 'any objectively determinable market rate or other rate that is not dependent on the will of either party',[683] and referred to the possible linking of interest rates to the rate set by the Reserve Bank, or to variations in prime interest rates of some other banking institution.[684] *In casu*, however, Stegmann J found the clause in question conferred upon the bank a power to determine the interest rate unilaterally, without reference to objectively ascertainable criteria, and was to this extent null and void.[685] Stegmann J also specifically distinguished the position *in casu* from the 'special case' of a banker fixing charges on an overdrawn current account, which was apparently justifiable in that this unilateral power was exercised not arbitrarily, but in accordance with long established banking practices.[686]

This decision is sharply criticised by Otto, who finds it unfortunate that Stegmann J failed in his judgement to refer to the decisions in *Nedbank Ltd v Capital Refrigerated Truck Bodies (Pty) Ltd* and *Boland Bank Bpk v Steele.*[687] As Otto correctly points out, the clause at issue in the *NBS* cases would not *per se* have been found unenforceable if judged in the light of the criteria to be found in the former cases. For firstly, the clause could have been subject to the criterion of reasonableness.[688] Secondly, even if wary of finding for a sufficient limitation in the concept of reasonableness alone, the inherent limitations placed on the bank's unilateral

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down as a rule of law, and not as an application of a principle of interpretation. It is a pity, therefore, that Kerr does not thereafter provide a thorough examination of *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd* 1993 1 SA 179 (A), as there are certainly indications in this case of the law moving towards an identification of reasonableness as an *ex lege* term in this context.

680 1998 3 SA 729 (W) and 1998 3 SA 765 (W) respectively.

681 At 732G and 770A respectively.

682 734E-F.

683 736E.

684 734G.

685 At 736J-737C. The court did, however, find the clause in question to be severable; consequently the entire contract was not vitiated. The equivalent clause in *One Berg River* was likewise found to be severable.

686 At 731A and 736A-C.

687 Otto 1998 *TSAR* 612; 1988 4 SA 73 (N) and 1994 1 SA 259 (T) respectively.

688 Whether by way of interpretation as in the *Boland Bank* case or, more directly so, as a possibly implied (by fact or by law?) term in the case of *Nedbank.*

power are patently clear: any variation in the rate was required to correspond to the rate for the class of bonds within which the bond in question fell, and could not exceed the rate set by law.

The case is also a curious one in that Stegmann J, for example, fails to explain why particularly a power to determine interest rates on overdrawn facilities is, as a 'special case', so distinguishable from a similar power to be found in other money-lending contracts such as mortgage.[689] To say that in the former case such a power may not be exercised arbitrarily but is governed by long established banking practice[690] is to beg the question. Surely this could be argued equally in the case of mortgage. For in *ABSA Bank Bpk v Saunders* evidence was given of a long list of factors taken into consideration by a bank manager in exercising his discretion to fix interest rates on overdrawn facilities.[691] These included the security offered by the debt, the client's financial stability, the degree of risk involved in the client's business, and the client's reputation in the community. Otto, however, as shall shortly be seen, cites very similar factors that can be used when *testing* whether a discretion to fix interest rates in other money-lending contracts such as mortgage has been exercised reasonably.[692] This suggests, of course, that the long-standing business practice upon which Stegmann J places so much stock has its foundation, ultimately, also in reasonableness. Reasonableness therefore is the defining element of this long-standing business practice. For as Stegmann J himself notes, the discretion is permitted because its exercise cannot be arbitrarily performed; that is, that ultimately the bank manager must not act arbitrarily, but reasonably. Thus one sees that the factors listed in *ABSA Bank Bpk v Saunders* do not define the long-standing business practice; they are (merely) factors to be considered when the interest rate is varied and, importantly, serve in the *ex post facto* testing of whether the discretion has been exercised in a non-arbitrary fashion i.e. reasonably. The concept of reasonableness can play just as central a role as the *definitive limit* in any other long-standing business practice or custom that has developed to set the limits of a unilateral power to determine rates of interest. Thus one should expect then that a similar practice would have arisen in the case of interest rates in

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689 This, however, can be explained in one sense if, as pointed out by Otto 1998 *TSAR* at 620, one considers that, in the event of the overdrawn debtor being unhappy with the new interest rates fixed by his banker, he is in a greater position to terminate the contract than in the case of a debtor in a long-term money-lending contract such as a mortgage. For generally, it should be easier to find the means to settle an overdrawn account than to find other finance to pay off a mortgage bond (and thus allow one to terminate one's contract with the mortgagee over unhappiness with newly varied interest rates). In *NBS Bank Ltd v Badenhorst-Schnetler Bedryfsdienste BK and Another* 1998 3 SA 729 (W) Stegmann J was of the view that should the contract in question have required the bank to give notice in the event of a variation in the interest rate, clause 14 would have been unexceptionable. For then the position would have been analogous to that in *Diners Club SA (Pty) Ltd v Thorburn* 1990 2 SA 870 (C): the debtor could then choose to accept the varied interest rate, or alternatively, reject the variation and terminate the contract (733D-I). As pointed out by Otto at 614, this may hold on facts such as those found in *Diners Club SA (Pty) Ltd v Thorburn* (where termination would simply entail the cancelling of one's contract for the use of a credit card, and moving one's business elsewhere), and possibly in the case of overdrawn facilities, but must be regarded as completely unrealistic to be expected of a debtor tied up in a long-term loan and with little chance of finding immediate finance elsewhere.

690 Stegmann J at 736A-C.

691 1997 2 SA 192 (NK) 196D-F.

692 1998 *TSAR* 619-620.

other money-lending contracts such as mortgage. Accordingly, this 'special case' of interest rates in overdraft facilities, grounded as it is in reasonableness, does not appear so unique after all.

Be that as it may, the luckless clause 14 suffered no better fate in the judgement of Southwood J in *NBS Boland Bank Ltd v One Berg River Drive CC and Others*.[693] In this case, however, counsel for NBS (who had also acted in *Badenhorst-Schnetler*) had done his homework and took the argument one step further.[694] Referring to *Boland Bank Bpk v Steele*, counsel argued that the power afforded to the bank in terms of clause 14 was not unfettered (and accordingly unenforceable) because the discretion was required to be exercised *arbitrium boni viri*.[695] Nonetheless, Southwood J found the clause conferred an 'unfettered discretion' on the bank to vary the interest rate, and consequently held the clause to be unenforceable.[696] Notably, however, the conclusion that the discretion was 'unfettered' did *not* follow from any view that a limitation *arbitrium boni viri* could not be a sufficient limitation in itself. Rather, while 'mindful' of counsel's approach, Southwood J simply found on the wording of clause 14 no intention that the power be exercised *arbitrium boni viri*.[697] Thus while the judgement is clearly an obstacle to the recognition of an implied (*ex lege*) term of reasonableness in such cases, it does not, in principle, question the possibility of reasonableness alone serving as an adequate limitation (or 'fetter') on a unilateral power.

Both *NBS Bank Ltd v Badenhorst-Schnetler Bedryfsdienste BK and Another* and *NBS Boland*

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693 1998 3 SA 765 (W).

694 Although somewhat belatedly; counsel's new line of approach (i.e. implied term of reasonableness) was not raised in pleadings (772F-G).

695 At 772E-G and 774B-C it would appear that counsel argues that it is a term implied by law that clause 14 be exercised reasonably, and that this argument followed specifically from the judgement in the *Boland Bank* case, as referred to above. As already pointed out, in the latter case it was, in fact, not specifically held that there was an *implied* (by law) term of reasonableness, but that the power in question be *interpreted* as being subject to such a term. It is thus interesting to note the manner in which little distinction is made between these two - in theory- fundamentally different approaches. See here, the criticism of Kerr, referred to at footnote 679 above.

696 Importantly, Southwood J refers to *Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd* 1991 1 SA 508 (A) for the view that it is a general principle of our law of contract that when it depends entirely on the will of a party to an alleged contract to determine the extent of prestation of either party the purported contract is void for vagueness; thereafter Southwood J noted that it had been specifically held in *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd* 1993 1 SA 179 (A) that this rule applies only where it is left to the unfettered discretion of the other party. While it is good to note that lower courts are now following the lead given in *Benlou* towards a qualified application of the *Westinghouse* rule, it is perhaps unfortunate that Southwood J did not consider it necessary to examine the possible 'fetters' contemplated by Van Heerden JA in the former case, such as the implication of reasonableness. This is particularly so as, as indicated in the text above, a possible implied term of reasonableness had been raised by counsel for NBS. Counsel here, however, might have done better to have emphasised this point by reliance on the judgement in *Benlou*, and not *Boland Bank v Steele* 1994 1 SA 259 (T).

697 774C. Southwood J also distinguished the case in question from cases cited by counsel (e.g. *Bellville-Inry (Edms) Bpk v Continental China (Pty) Ltd* 1976 3 SA 583 (C)) in support of his argument that there was an implication of reasonableness, in that the cases referred to by counsel first required some sort of 'factual determination' before the party holding the discretion or power in question could exercise the latter (774E-F).

Bank Ltd v One Berg River Drive CC and Others are cuttingly criticised by Otto, who regards them as 'om dit sagtens te stel, nie kommersieel verstandig nie'.[698] Otto suggests that the effect of these decisions is that clients who do not agree to proposed variations in interest rates can oblige their banks to continue levying interest at the rate fixed in their original contracts for perhaps ten or twenty years, unless the banks find recourse in some other solution at present unknown to Otto.[699] This would be economic suicide as - as clearly demonstrated recently by fluctuating interest rates in the South African markets - it is simply not feasible to work with fixed, invariable interest rates in contracts such as long-term loans.[700] Nonetheless, Otto's criticism may be somewhat overstated. On the one hand, Otto incisively points out that the clause 14 was probably part of a standard term contract, of which thousands have possibly already been registered, with the intention of governing the relationship between mortgagor and mortgagee for many years to come. This is certainly a painfully unhealthy situation.[701] On the other hand, however, it can clearly be seen in both decisions that the Witwatersrand High Court did *not* envisage that the interest rate applicable in a long-term money-lending contract should be held indefinitely to a fixed level. This can be seen especially in Stegmann J's observation that variations in interest rates could be linked to variations in the bank rate fixed by the Governor of the Reserve Bank, and in this way be fully enforceable as being determinable by objectively ascertainable criteria.[702] The fear in both cases would appear to be of abuse of this discretion to the disadvantage of the client, the consumer. Consequently one perceives that in both judgements the verdicts reached by Southwood J and Stegmann J are motivated by a desire that such objectively ascertainable criteria, which provide the safeguard against abuse, be more clearly defined. If this could be achieved, the courts would (presumably) not raise an objection to the variation of rates falling in within the (now more clearly fettered) discretion of the creditor.

On the other hand, it can be strongly argued that the necessary objectively ascertainable limitations are present already, and simply require to be recognised. This ultimately is Otto's point. Aside from any other limitations placed upon a unilateral power to determine a rate of interest, any such determination by the creditor *can in any event* always be subjected to the dictates of reasonableness and good faith.[703] Otto finds authority for this approach not only in

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698 1998 *TSAR* 617.

699 Ibid.

700 614.

701 617. Otto at 614 also points out that a similar clause in *ABSA Bank Ltd v Henning* case no. 32954/97 (W) (unreported) suffered a similar fate, the court in this case following by implication *NBS Bank Ltd v Badenhorst-Schnetler Bedryfsdienste BK and Another* 1998 3 SA 729 (W). Accordingly, the deeds of mortgage of two different commercial banks are affected.

702 734G.

703 1998 *TSAR* 619. Aside from the invocation of an implied term of reasonableness, Otto at 618 also considers that the interpretative approach followed in *Boland Bank v Steele* offers a solution, as does the possibility of finding for a suitably entrenched business practice, which would then permit the bank to fix interest rates in its discretion. Otto presumably has in mind here a business practice along the lines of that to be found in *ABSA Bank Bpk v Saunders* 1997 2 SA 192 (NK). As suggested above, one would possibly not have to go far to find the concept of reasonableness as an important and underlying element of such a business practice. Add to this the observation that little distinction is made between interpreting a unilateral power as being subject to reasonableness, and finding for such an implied term itself, and one cannot be but struck by the extent to which reasonableness, in whatever form we choose to place it, is central to the issue.

cases such as *Boland Bank v Steele* and *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd*,[704] and in the approach to good faith in other areas of South African contract law,[705] but refers also to its use in other jurisdictions such as The Netherlands and Germany.[706] In the application of this test, factors such as the risk involved in granting the loan, the class of client, the security provided by the debtor and current market rates should all be borne in mind; furthermore, debtors should also be required to be given notice on variation.[707] Moreover, if the determination is found wanting, the current rate should apply until replaced by a reasonable one.[708]

It is submitted that Otto's approach is the correct one. It should find useful application not only in the context of interest rates, but should also contribute to the argument for clearer recognition to be given to reasonableness as a limitation on unilateral powers in other contexts, such as in the setting of price.

6 4 6 2 Powers to fix price ab initio, *powers to vary, and the principle of autonomy*

An issue that has received little attention in this study is whether a distinction should be made between a unilateral power to determine price *ab initio* and one where the power is to vary or adjust a price which was initially determined *ex consensu*. As apparent in the section immediately preceding, it comes to the fore within the context of a unilateral power to determine interest rates, as the power afforded the banker in these cases is invariably one to vary a rate of interest set initially by both the banker and the client in their original agreement. On the other hand, it is a question not discussed in the series of Appellate Division cases on unilateral powers concerning rental and price which have prominently featured in the 1990's. Lubbe, however, makes this distinction in the course of his discussion of *Nedbank Ltd v Capital Refrigerated Truck Bodies (Pty) Ltd*:[709]

> Die beslissing in die *Nedbank*-saak kan ook ondersteun word deur te onderskei tussen 'n kontrak wat 'n aanvanklike diskresie verleen, en een wat 'n bevoegdheid gee om die terme van 'n kontrak van andersins bepaalde inhoud van tyd tot tyd wysig. 'n Klousule aangaande eensydige wysiging van rentekoerse raak in beginsel nie die bepaaldheid van die kontraksinhoud nie. Die moontlikheid van 'n rentekoerswysiging *per se* doen nie af daaraan dat daar wel 'n geldende en bepaalde koers (of huurgeld) deur onderlinge ooreenkoms neergelê is nie. Die feit dat die een party instem daartoe dat die ander die koers diskresionêr eensydig kan wysig, doen nie afbreuk aan eersgenoemde se autonomie nie: die wysigingsklousule is immers juis 'n uitvloeisel van sy outonome beslissingsbevoegdheid. Daar is dus, mits die moontlikheid van kontrole aan die hand van die *arbitrium boni viri* in gedagte gehou word, vanuit 'n

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704 1994 1 SA 259 (T) and 1993 1 SA 179 (A) respectively. Otto (604-605), in fact, refers to the *Benlou* case within the specific context of 'prysvasstelling', and not within the context of the fixing of interest rates. Importantly, however, he recognises that the effect of this decision is that the unilateral determination of price can ultimately be tested against the requirements of reasonableness and good faith, and would for this reason also not be considered an impermissible unfettered discretion.

705 608-610.

706 Ibid.

707 619-620.

708 The last suggestion, as Otto notes (619), is Lubbe's: 1989 *TSAR* 175.

709 1988 4 SA 73 (N).

> beleidsoogpunt niks wat stry teen die erkenning van die eensydige wysigingsbevoegdheid nie. Wysiging, behoorlik oorgedra aan die ander party, bring opnuut sekerheid omtrent die inhoud van die kontrak. By 'n aanvanklike diskresie kan daar moontlik geargumenteer word dat 'n hof, by weiering van 'n party om die prys to bepaal, voor die probleem te staan sal kom om 'n redelike en billike prys vir die partye te moet bepaal, en dat dit moontlik iets is waarteen, in die lig van die traagheid van die howe om vir partye 'n kontrak te maak, gestuit sal word. Hierdie probleem bestaan nie by klousules wat voorsiening maak vir eensydige wysiging van 'n aspek van die kontraksinhoud nie.[710]

Thus firstly, it is evident that Lubbe finds the *arbitrium boni viri* as an adequate check on any potential abuse of a unilateral power.[711] Importantly, he would not appear to regard this check as any less effective within the context of unilateral powers to determine a rate of interest or rental *ab initio*, than in the case where this power extends only to a consequent variation of the term fixed initially *ex consensu*.[712] This would tally with the decisions in, for example, *Genac Properties Jhb (Pty) Ltd v NBC Administrators CC* and *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd*[713] where on the facts, reasonableness was accepted as a limit on, for example, the landlord's *ab initio* discretion to incur costs, and to subsequently charge these to the lessee's account. Merely because there is an initial price or interest rate, does not make the possibility of a (mere) subsequent variation any less dangerous where this power of variation is unchecked. An initial price or rate of interest, as a benchmark agreed upon at outset by both parties, may make, of course, a subsequent appraisal of the reasonableness of a varied price or rate an easier exercise than in the case where this has been left *ab initio* in the power of a party. In the latter case, for instance, where does the court begin in ascertaining whether the party has set a reasonable price? However, in substance, the limit on the unilateral power remains the same: it must ultimately be exercised *arbitrium boni viri*.

Accordingly, the distinction made by Lubbe between these two types of discretions (i.e. *ab initio* versus consequent variation) is regarded as potentially more important from the view of party autonomy. Thus Lubbe observes that it could be argued that in the case of a unilateral power to determine a rate of interest (or prestation) *ab initio*, there is greater risk of effect not being given to the autonomy of the parties.

For as Lubbe has pointed out, in the case of a provision concerning interest in a money-lending contract, the initial rate of interest ensures that there is (at least initially) certainty with respect to the contents of the contract. As Lubbe is moreover of the belief that the abuse of unilateral powers can be adequately safeguarded by the requirement of *arbitrium boni viri*, he furthermore suggests that where a consequent variation is found not to be reasonable, the initial rate applies until replaced by a reasonable variation. Certainty of term therefore remains. There should be no reason in principle why a similar approach could not applied with regard to unilateral powers concerning the variation of price and rent.

On the other hand, the position regarding a unilateral power to determine a rate of interest or price *ab initio* is indeed different. There is, in fact, no initial certainty with regard to the price

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710 1989 *TSAR* 175.

711 See here Lubbe's reference to Roman law for the origins of the *arbitrium boni viri*: 1989 *TSAR* 172 n 76.

712 See also Van der Merwe et al *Contract* 165.

713 1992 1 SA 566 (A) and 1993 1 SA 179 (A) respectively.

or rate of interest until the relevant party has exercised this power. And, indeed, where he or she fails to do so, the court is then faced with the decision as to whether it may intervene and 'make the contract for the parties'. Here, immediately, the question of giving effect to the autonomy of the parties comes to the fore.

This, however, is also a real possibility in the previous scenario sketched, viz. of a unilateral power merely to *vary* a price or interest rate initially agreed upon *ex consensu*. For what, in this case, if there is never agreement on a reasonable variation? It would be unrealistic to expect the previous rate of interest or price to remain valid and binding indefinitely. Were this the case, the debtor, for instance, in a money-lending contract, would have no incentive to agree to an upward variation by his bank; he would be content to rely on the previous (lower) rate. The parties would then, presumably, be compelled to turn to the courts for clarity on what constitutes a reasonable variation, and the court would be faced again with its dilemma of whether it should be making the contract for the parties. Admittedly, its wariness may be less in these circumstances as, at the least, the parties took initial responsibility for the setting of the price or interest rate. Furthermore, as pointed out above, the court is assisted, in its attempt to ascertain whether the consequent variation is reasonable, by a benchmark in the form of the initial price. In principle, however, this scenario indicates that it not a problem restricted to *ab initio* powers alone, and thus suggests that the distinction between the two types of unilateral powers should not be taken too far.

In any event, this dilemma is not a new one. It has long confronted our courts in the context of price-setting by third parties. Here, where a third party sets a manifestly unfair price, our courts will substitute its own reasonable determination - though it hesitates to make the latter binding.[714] But here too, a third party may fail to set a price in its entirety, and the courts are faced with the exact same problem: may, and should, it make the contract here? This has been discussed at length under Chapter 2.[715] It suffices to say that there can be surely little difference between the case where a party to a contract fails to set a price or sets one (whether *ab initio* or by way of consequent variation) which is manifestly unfair, and the case where this is done by an appointed third party. Thus in the former case it is suggested that, once more, the courts will do well to establish the intention of the parties. Where the parties, in affording the power to one of them, intended that he or she alone should make this determination of price, there may be little room for substitution of a reasonable price by the courts, which would then be held binding upon the parties. This may count likewise where the parties (or a party), in the event of dispute or a failure of any price being set at all, clearly from outset would have wished to avoid the costs of litigation in the ascertainment of this price by the court, and would rather the contract be simply terminated. On the other hand, it may be established that the parties did not regard the unilateral power enjoyed by one party as the *essential* mechanism in any determination of price, but desired merely that the latter be reasonable. In such a case, there may be something to be said for an approach which holds that any reasonable price substituted by the courts may be held binding.

This discussion also leads one to question the extent to which the issue of party autonomy is examined in *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd.*[716] Here, two situations

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714 See 2 5 4 1.
715 See especially 2 5 4 1 and 2 5 4 2.
716 1993 1 SA 179 (A).

are at issue. The first is to what extent the implication of reasonableness amounts to the court making the contract for the parties.[717] Indeed Brassey's main criticism of the *Benlou* decision is the failure of the court to traverse this question.[718] On a general level this, of course, has been dealt with in the paragraphs immediately preceding. An examination of this question can also be found under the discussion of price ascertainment powers afforded third parties at **2 5 4** above, and a possible doctrinal justification for this implication is also briefly discussed at **6 4 6 3** below.

In any event, Van Heerden JA in the *Benlou Properties* judgement appears sensitive to this fear. This can be seen in the following exception made by the judge. For while it will 'usually' imply an *ex lege* term of reasonableness (where this has not already been done expressly or tacitly by the parties themselves), the court will not always do so; it recognises that there may be cases of an agreement where the parties make clear their intention that the unilateral power lies wholly within the unfettered discretion of the one party.[719] In such a case it appears there would be no room for the implication of reasonableness, and accordingly the unilateral power, is not saved on this ground. Clearly, the court is here giving effect to the intention of the parties - although it is probable that the courts would require a very clear expression of an intention not to be bound by reasonableness.

The second and very much related issue is whether public policy permits a party to agree to permit his co-contractant the unilateral power to determine prestation, and thereby, apparently, to forfeit his autonomy regarding the determination of the consequences of his contract. To the extent that this issue concerns the principle of autonomy (and is not merely a rephrasing of the fear of abuse of a unilateral power), it presents few problems. As Lubbe has clearly stated, where a party agrees to the inclusion of such a power, 'die wysigingsklousule is immers juis 'n uitvloeisel van sy outonome beslissingsbevoegdheid'.[720] Provided control over this power can be enforced by way of the *arbitrium boni viri*, there exists no reason in

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717 Strictly speaking, if reasonableness in this context is recognised as an *ex lege* term, such an objection cannot stand. As pointed out by Kerr *Sale* 54, a court, in identifying and/or formulating or reformulating an *ex lege* provision, does not make the contract for the parties; rather, it tells the parties what the law provides in the absence of express or tacit provisions. Thus the objection can be framed on a different level: does the law, by recognising and providing for such an *ex lege* term, attempt thereby to make the contract for the parties and undermine its own declared adherence to the principle of autonomy? In this regard, one is referred to 6 4 6 3 where it is suggested that the *ex lege* implication of reasonableness is simply the application of the principle of good faith which is well recognised as underlying our law of contract. Of course, if the courts go no further than finding for a *tacit* term (which subjects a unilateral power in *a particular contract* to reasonableness), and it does so by implying an objective test, than *the court itself* opens itself up to the charge of making the contract for the parties.

718 1993 *AS* 189. Brassey identifies the three problems at issue in this context: (i) the fear that a power afforded to a party to determine prestation leaves the amount of that prestation too vague to be enforced, (ii) the fear that such a power leads to abuse and potential enslavement, and (iii), the fear that the courts will be burdened with the duty of making the contract for the parties. As indicated by Brassey, the first two questions are indeed answered in *Benlou*, but unfortunately, not in such a manner so as to indicate that they are separate questions. The third question is identified by Brassey as not having been traversed at all.

719 187J-188C.

720 1989 *TSAR* 175, cited also in the extract in the text above.

public policy not to recognise the latter. It is therefore noteworthy that Van Heerden JA also remarked as follows:

> Nor is there a policy reason why such an undertaking should be void merely because it relates to the exercise of a discretion. Although pronounced in a different context, the following oft-quoted dictum of Sir George Jessel MR in *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 at 465 is apposite:
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> '... if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice'.[721]

Accordingly, whereas critics of the *Benlou* approach would be apt to place an emphasis on the court (or strictly speaking, the law) *implying* a term in the contract (viz. an *ex lege* term of reasonableness), the court in *Benlou* would emphasise that it is *giving effect* to a term of the contract (viz. the discretion in favour of one the parties). The court in *Benlou* would thus argue that by *enforcing* the unilateral power, although it subjects it to an (implied) limitation, it is giving greater effect to the autonomy of the parties than it would by *not* implying a term and holding the unilateral power to be unenforceable. The implication of reasonableness, in this light, serves the principle of autonomy.

Thus, in a case such as *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd* we view the tension once again: on the one hand, the courts are implored not to make the contract for the parties, and on the other, they are obliged to give effect to the autonomy of the parties. Thus a failure to imply reasonableness wards off the accusation of making the contract on one front, but fails on another. As should now be evident, this study is of the view that in the absence of indications to the contrary, the law implies a term of reasonableness which, invoked, permits parties to express their autonomy by agreement on unilateral powers.

Finally, it is surprising to find that Kerr remains of the view that the parties may not agree on price to be determined by one of them alone, and appears to make no concession to even a qualified version of this rule.[722] This is surprising considering that reference is made by Kerr to decisions such as *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd*, *Murray & Roberts Construction Ltd v Finat Properties*, and *Genac Properties Jhb (Pty) Ltd v NBC Administrators CC*.[723] Kerr does, on the other hand, recognise that the basis for this rule does not rest on the requirement of certainty, at least in the sense of vagueness;[724] this should by now be well recognised. As a basis for the rule, Kerr suggests that such unilateral powers are not recognised because the granting of such a determination to a party indicates that the parties 'have not progressed far enough towards *consensus* for their agreement to be recognised as a contract'.[725] As should now be clear from this study, this cannot form a justifiable basis for Kerr's support of the unqualified rule. In as much as an agreement on a fixed price is an expression of the autonomy of the parties, so too is an agreement on a

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721 187H-I.
722 Kerr *Sale* 54-55, 58.
723 1993 1 SA 179 (A); 1991 1 SA 508 (A); 1992 1 SA 566 (A).
724 Kerr *Sale* 58.
725 59.

unilateral power - even one which authorises a unilateral power *ab initio*. In the South African law of sale, a term may be certain or objectively ascertainable; thus where parties agree on the later *objective ascertainment* of price, their consensus on this term is regarded as sufficient. It has been shown that the granting to a contractant of a power to determine or adjust price is regarded as a form of objective ascertainment of price, *provided* that this power is subject to objectively ascertainable *limitations*. In such a case, there can be no argument that the parties have not reached consensus.

6 4 6 3 The arbitrium boni viri *as part of the principle of good faith*

It has already been indicated that the South African law of contract is subject to the overriding norm of good faith.[726] As indicated by Zimmermann, many *ex lege* terms currently recognised in South African contract law can be regarded as concrete manifestations of the basic principle of *bona fides*.[727] The *ex lege* rule requiring a third party who is entrusted with fixing a price to exercise his power *arbitrio boni viri* may be regarded as one such manifestation of the latter principle; this rule has strong roots in classical Roman-Dutch law, where all contracts were considered *bonae fidei*.[728] With regard to a similar power afforded a party to the contract, recent cases such *Nedbank Ltd v Capital Refrigerated Truck Bodies (Pty) Ltd* and *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd*, and writers such as Lubbe, Otto, Christie and Van der Merwe et al,[729] all endorse the application of the *arbitrium boni viri*, or reasonableness, as an implied limitation. It appears, therefore, that that the role of the *arbitrium boni vir* in this latter context finds a similar doctrinal home as part of the principle of good faith which underlies and informs the South African law of contract.[730]

6 4 6 4 Analogy with price-fixing by third parties

As should be evident, when examining the issue of unilateral powers in favour of a party to the contractant, the comparative situation of a power granted to a third party may be kept in mind. Van Heerden JA himself in *Benlou Properties* has drawn this comparison.[731] This is particularly so in two respects.

Firstly, cases involving unilateral price ascertainment powers that have come up before the courts have merely involved the courts ruling on whether the power granted in the contract *in*

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726 See the discussion of good faith in South African law at 5 3 2 above.

727 Zimmermann *Good Faith* 245.

728 For this rule in Roman-Dutch law, see e.g. *Machanick v Simon* 1920 CPD 333 at 338-339.

729 Lubbe 1989 *TSAR* 172, 175; Otto 1998 *TSAR* 608; Christie *Contract* 110; Van der Merwe et al *Contract* 165-166. For the most recent, and thorough, statement on this, see in particular Otto, ibid.

730 As noted by Zimmermann *Good Faith* 245, there is no *numerus clausus* of *ex lege* terms; new ones may be continuously developed to adjust the law to changing circumstances. The recognition of such an *ex lege* term could be just such a development, particularly in the light of the frequent use being made by modern contractants of unilateral powers. On the other hand, it could be equally well argued that the implied term of reasonableness within the specific context of a unilateral power to set price, is not a new *ex lege* term at all; it is only in recent years, however, that our law has seen fit to 'rediscover' it.

731 Above, at 185G.

casu results in the nullity of the contract or not. The courts have not had, as yet, to determine whether a particular price has been determined unreasonably by a party; consequently, they have likewise not yet been faced with the question whether they may set aside a price and substitute their own reasonable determination, and whether they could hold the latter as binding upon the parties. As apparent in particular from the discussion in **6 4 6 2**, these are all questions which have already arisen within the context of price-fixing by third parties; useful reference may accordingly be made to **2 5 4 1**.

Secondly, it appears that a third party appointed to fix a price need not be entirely independent of the parties, but is required, rather, to exercise his or her discretion reasonably. There can be little real difference between a power afforded to a party to a contract, and one afforded his or her nominee or agent. In as much as in the latter case the co-contractant is protected by the requirement that the non-independent exercise his or her power reasonably, this same protection may be obtained where a similar limitation is imposed upon a power-holding party. For further discussion and authorities, reference may be made to **2 5 4 3**.

6 4 6 5 The quantification of reasonableness

Our courts are capable of quantifying the concept of reasonableness. This applies to where a court must determine whether a price set by one of the contractants in the exercise of his or her unilateral power is reasonable, as well as in the event of the court itself having to supply a reasonable substitute hereto. With respect in particular to unilateral powers to set price or rent, this is evident in the view of Nicholas AJA in *Genac Properties Jhb (Pty) Ltd v NBC Administrators CC*.[732] This has also been demonstrated before, particularly in the context of prices set by third parties,[733] and in the discussion as to whether South African law recognises sale for a reasonable price.[734] Furthermore, while reservations have been expressed with respect to the difficulties encountered by a court in determining a reasonable price well after performance was envisaged to have taken place,[735] it has likewise been pointed out that these constitute challenges to be faced, not avoided. In this respect the court is well aided by the judicial process; the court makes its decision on the basis of evidence established before it. This ensures that an arbitrary, judge-made valuation (as to what would constitute a reasonable price) is not foisted upon the parties.[736] This furthermore alleviates the fear of the courts making the contract for the parties.

6 4 6 6 The approach in foreign jurisdictions

Finally, as observed by Van Heerden JA, various overseas jurisdictions recognise that a unilateral power to fix or vary price may be afforded to a party to the contract. Thus in the United States, it is not fatal if one of the parties reserves the power of fixing or varying the price, if the exercise of this power is subject to prescribed or implied limitations, such as that

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732 1992 1 SA 566 (A) 577G-578C.
733 See 2 5 4 1 above.
734 See 2 3 2 above.
735 See e.g. *Maceys Consolidated (Pvt) Ltd v TA Holdings Ltd* 1987 1 SA 173 (ZS) 180.
736 Lubbe 1987 *AS* 138.

the variation must be in proportion to some objectively determined base or must be reasonable or in good faith.[737] Where the transaction in question is in any event a contract for the sale of goods, Corbin notes that all doubt as to the validity of the contract is removed by § 2-305 (2) of the Uniform Commercial Code which provides that a 'price to be fixed by the seller or the buyer means a price for him to fix in good faith'.[738] Likewise, in German law, § 315 I BGB provides that one of the contracting parties may determine performance.

6 4 7 Unilateral powers: concluding remarks

What therefore is our law on unilateral price adjustment or determination powers? From the above study, it is clear that the Appellate Division today permits parties to afford a contractant the power to ascertain or adjust prestation (and thus price), provided that the power is not completely unlimited. Moreover, there are indications in decisions by this court that in the final resort, the necessary limitation may in any case be supplied by the notion of reasonableness - provided, that is, that an intention by the parties not to bound by this latter limitation cannot be deduced.

This view is furthermore supported by most recent commentators on the South African law of contract.[739] Thus Van der Merwe et al state that

> a power to vary an aspect of the performance [e.g. price] should be effective if it is not completely unlimited (if only in the broadest sense), and provided the power is exercised according to the standards of reasonableness and good faith ... [740]

Furthermore, commenting on the *Benlou* decision and that the traditional rule that a sale is invalid if the price is to be determined by one of the parties to the agreement is due for welcome reconsideration, Christie notes that

> [a]ssuming our courts would follow other legal systems in imposing a duty of good faith on the party fixing the price ... there would be no ground of public policy on which the law could invalidate the bargain the parties had made with their eyes open.[741]

Such a development is welcomed. This is particularly so when one considers that, in recognising that a party to a sale may vary price by the exercise of a limited unilateral power, contractants are afforded yet another tool in providing for some form of contractual adaptation closer in time to the occurrence of contingency.

6 5 Price adaptation in long-term contracts

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737 Corbin *On Contracts* § 4.4.
738 Ibid.
739 Aside from Van der Merwe et al and Christie cited below, see also Lubbe 1989 *TSAR* 175 and Brassey 1993 *AS* 188.
740 *Contract* 166.
741 *Contract* 110.

6 5 1 Introduction

As discussed in Chapter 4, two parties may involve themselves in a long-term relationship, in their capacities as buyer and seller.[742] This may result from the deliberate creation from outset; the parties may, for instance, expressly agree to engage in business together for a period of fifteen years. Alternatively, the relationship may be *de facto*; it may result from regular interaction between the parties over a period of time.[743] During the duration of the relationship, contingencies may arise which may threaten the balance of reciprocal performance established by the parties. The buyer, for instance, may no longer regard the rendering of his performance (payment of price) as adequately compensated by the goods which he receives in return, or alternatively, the seller may feel the price he receives as no longer commiserate with the performance he renders (viz. departing with the goods). If the relationship is to be maintained, such a balance between performance and counter-performance should be restored, and this should be possible on a continuous basis throughout the relationship.

In such cases, parties in a relational contract may simply elect to enter into a series of contracts of sale, with each new contract being entered into as the need arises. No one contract of sale is said therefore to govern for the entire duration of the contract. Consequently, if a contingency materialises which threatens the balance between price and the value of the goods being sold, the parties simply enter into a new contract, with the terms of this contract being provided on an *ad hoc* basis. A great deal of flexibility is consequently accorded the parties in these arrangements, in that the terms of the new contract may be made significantly different from the previous contract. At the same time, however, such an arrangement would appear to provide little security of tenure for the parties. Following the termination of one contract, a party is at liberty to refuse to agree on the next, and the relationship is terminated as a consequence.

This problem may, however, in some cases be more apparent than real. Although lacking in strict contractual security, such a relationship may be maintained by the operation of other non-legal forces. The relationship may be maintained by an economic dependence by both parties on the continuation of the business relationship. The transactions between the two parties may, for example, involve resources which are highly specialised. The seller of the goods in particular may be the one of few manufacturers of the latter, whilst the buyer may be one of the few distributors with the expertise and organisational capacity to distribute such goods, and may have invested heavily in infrastructure in order to manage such distribution. Clearly, both parties have a strong financial interest in maintaining the relationship. Likewise there may exist a mutual confidence and trust between the parties that has built up during the course of many years of successful and profitable co-operation. As circumstances change and contingencies arise, there may be an accompanying gradual adaptation in behaviour by both parties, and the consequent adoption of compromises, in the expectation that the relationship will continue. A businessman, where confident that his or her co-contractant shares a similar interest in the maintenance of a relationship beneficial to both, will frequently adopt the pragmatic approach of working out the fine working detail of a contractual relationship as the

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742 Goetz & Scott *Principles* 153 mention the following as examples of long-term relational contracts: distributorships, franchises, joint ventures, and employment contracts.
743 Bell *Long-term Contracts* 195.

need for it arises.[744] Accordingly, whether operating individually or cumulatively, such economic and social forces may function to ensure that contractants provide for adjustments whilst remaining in relationship.[745]

On the other hand, this security might not be regarded as adequate, especially given the presumption of opportunism which has been suggested to constitute a primary source of transaction costs, and the fact that the effect of such relational forces may often only be felt after a period of considerable time. This is perhaps especially true of parties who envisage entering into a long-term relational contract. Consequently, they may seek to enter into a contract which binds them for some considerable period, and thus affording them both a measure of contractual security, whilst providing for some flexibility or latitude with respect to its terms. This may be achieved by the creation of a broad contractual framework which thereby establishes a contractual *nexus* between the parties, with flexibility provided by allowing the parties to agree and enter into 'smaller' agreements on specific aspects of their relationship (and which are not covered by the framework agreement) on an *ad hoc* basis. In South African case law, this has been illustrated by the recent Appellate Division decision of *H Merks & Co (Pty) Ltd v The B-M Group (Pty) Ltd and Another*.[746]

6 5 2 The Merks *case*

6 5 2 1 Facts and approach of the court

In *H Merks & Co (Pty) Ltd v The B-M Group (Pty) Ltd and Another,*[747] Merks (or its nominee company or close corporation) was appointed by the B-M Group to be the exclusive sales agent, distributor and purchaser of Clairol products in South Africa for a period of five years. By way of advance annual and quarterly forecasts agreed upon between the parties, Merks undertook to purchase from B-M a certain amount of the above product each year, which Merks in turn would distribute for its own account. The agreement was entered into and commenced from approximately the beginning of 1989, and the prices of Clairol products for 1989 were fixed by agreement by both parties. The contract stated, furthermore, that prices could thereafter be increased by mutual agreement, and it was common cause that this could be done so on an annual basis.

Accordingly, little problem was encountered during the first year of the relationship. When, however, Merks towards the end of 1989 provided certain provisional forecasts of the stock it would require for the following year (and thus purchase), it was informed by the B-M Group that prices had been increased. The new prices quoted by B-M were between 36% and 150% higher than the previous year's prices. Merks objected and B-M adjusted the prices further,

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744 See e.g. the attitude of the parties in *Build-a Brick BK en 'n Ander v Eskom* 1996 1 SA 115 (O) 129E.

745 On non-legal relational forces in general see Bell *Long-term Contracts* 200; Macneil *Contractual Relations* 70-71, 81-82; McKendrick *Regulation* 309-310. See also in particular the dynamics of dependence created by transaction-specific exchanges: Williamson *Contract Analysis* 52-55. Also the discussion at 3 3 3 above.

746 1996 2 SA 225 (A).

747 Above.

but on average the new prices were still a little under 50% higher than the previous year. Merks still did not agree to this and a stalemate ensued on this point. Under these circumstances, B-M purported to terminate the relationship, with the consequence, amongst others, that B-M was sued by Merks for repudiation and damages in the amount of R8,2 million. The pith of Merk's argument was that the alleged attempt by B-M to adjust unilaterally the price amounted to repudiation, whilst B-M pleaded that the failure to agree on a price increase merely had the effect that no contract had for that year come into being, and that consequently, the relationship between the parties had been terminated.

In an analysis of the contractual relationship between the parties, termed by the court a distribution or concessionaire agreement, Nestadt JA noted that that encountered *in casu* was not an uncommon arrangement.[748] Its effect had been to create a reciprocal contractual relationship, and in this respect a *vinculum juris* had undoubtedly been created: the contractual relationship, for instance, afforded Merks a remedy if B-M had during the course of the five years appointed some other company to market its goods, or had attempted itself to sell Clairol products directly to the public. With respect to the parties' disagreement over price, the judge of appeal noted further that although the contractual relationship undoubtedly had a flavour of sale, the agreement was to be more properly regarded as providing a contractual framework for the conclusion of a series of purchases (that is, a series of individual contracts of sale) which would be entered into on an *ad hoc* basis between Merks and B-M, and grouped together on an annual calendar year basis. Nestadt JA accordingly held that the agreement amounted to a species of *pactum de contrahendo*, that is, an agreement to make a contract in future, namely, a contract (or contracts) of sale. The agreement as *pactum* would likewise be enforceable if the price of these contracts of sale were certain or ascertainable. This would be so because the contract which is envisaged to be made by the *pactum* is a contract of sale. For a contract of sale to be enforceable, price must be certain or ascertainable. Consequently, in that these prices were still to be agreed upon, the agreement as *pactum* could not be said to be enforceable. Following the logic of the court, it followed therefore (although this was not stated directly by the court) that although Merks could argue that it had accepted and exercised a right arising from the *pactum*, it could not oblige B-M to contract on the basis of the price set out in the *pactum*. This was so because there was in fact no price set out in the *pactum*; the *pactum* was unenforceable. Accordingly, in the absence of agreement on price, no new contract of sale had been entered into for 1990, and Merks' claim for damages was doomed to failure.

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748 The court referred here to the English Court of Appeal decision of *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 2 All ER 216 (CA). In this case, the defendants were appointed sole concessionaires for marketing a certain product in England, and which was to be supplied to them by the plaintiffs. The agreement entered into between the parties was oral, and no express mention had been made with respect to the duration of the relationship, other than that it could be terminated on reasonable notice. Three years into the relationship, during which time the defendants had sunk great costs into the relationship, much of which could only be recouped at a later stage, the plaintiffs suddenly saw fit to appoint another company as its concessionaire. Disputed, among other aspects, was the length of period which could be said to constitute reasonable notice within the relational circumstances. A similar arrangement is to found in *Evans Marshall & Co Ltd v Bertola SA and Another* [1973] 1 All ER 992 (CA), where a distributorship agreement for the supply of sherry was entered into for an initial period of five years, and thereafter a further period of five years unless terminated at the end of the first period.

6 5 2 2 Critical analysis

The judgement by Nestadt JA is a useful one. It indicates that in a contractual relationship of the type entered into by the parties in the case above, the arrangement may be said to constitute two parts.

Firstly, the contractual relationship constitutes a fully enforceable *vinculum juris*, with a content comprised of the reciprocal rights and duties created between two parties in their capacities as seller and purchaser-distributor/concessionaire. A seller, such as the B-M Group, could be contractually compelled to refrain from supplying any other distributor with the goods in question, while the concessionaire could likewise be prevented from distributing any other manufacturer's goods.[749]

Secondly, this same contractual relationship constitutes a *pactum de contrahendo* in that it also amounts to an agreement to make another contract (or contracts).[750] Here, the contractual relationship itself, the *vinculum juris*, provides a framework for the conclusion of a series of contracts of sale. The view of Nestadt JA in this case, however, was that the contractual relationship as a *pactum de contrahendo* is unenforceable. For it to be enforceable, the *pactum's* content must be enforceable; accordingly, all the terms of the contracts of sale envisaged by the *pactum* must be certain or ascertainable, including price. Thus as there is no agreement from outset in the *pactum* (i.e. the general contractual framework) on any price which can then be incorporated as forming a term of a contract of sale, at most it *envisages* the creation of the latter. By itself, however, it does not bring about this creation, as for each successive contract of sale, fresh agreement on price is required. Thus unless some other construction can be afforded to the words of the contract (namely, that the 'price may be increased by mutual agreement from time to time'),[751] this agreement is lacking. The contractual relationship forms a *framework* for this possible agreement, no more, no less.[752]

The contractual relationship between the parties in the *Merks* case may thus be said to be as follows: a broadly enforceable *vinculum juris* (the concessionaire or distribution agreement) which likewise constitutes a *pactum de contrahendo*, and which whilst not enforceable as the latter, nonetheless provides a framework towards the conclusion of further contracts of sale. The real effect of this agreement should not be understated.

Firstly, as backdrop to the framework agreement, lies an established legal *nexus* between the

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749 See for instance the remarks by Nestadt JA at 232G as to the fact that a remedy is provided when, in a distributorship or distribution agreement, this long-term contractual relationship is broken when some other party is appointed as distributor, and see in particular, the facts of *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 2 All ER 216 (CA), where such an agreement was broken, and the remedy granted herein. These cases indicate that although often (as will appear below) described as a 'framework', such a relational contract has real legal force.

750 On the enforceability of a *pactum de contrahendo* in general, see Van der Merwe et al *Contract* 56 ff; Christie *Contract* 39 ff.

751 This will in fact be argued later - see 6 5 5 below.

752 This is indeed stated by the court at 233D, but, it is submitted, is not afforded the attention it deserves.

parties. This legal *nexus*, the concessionaire agreement, has an effect similar to that of a restraint of trade: neither party may pass his or her business to another. Thus the seller may not look to pass on his wares to another distributor, and in turn, the latter may not act as distributor for some other. The parties would appear locked into relationship. Consequently, by being already contractually bound to each other, the next step to a further *nexus*, namely, by agreeing on a new price and therefore the creation of a new contract of sale, is *conceivably* that much more easily taken. The existing *vinculum juris* thus encourages further agreement, namely, on the new prices for the following four years. Indeed, this was probably the view of the parties in the *Merks* case; that is, they expected agreement.[753] It is possible, for instance, that they regarded as the real achievement the very fact that they had entered into a complex concessionaire agreement. Details such as price were expected to be accomplished during the working out of the contract.[754]

Secondly, there may also be cases where, in addition to the above, economic and social relational forces give momentum to any move towards fresh agreement on price. In a long-term contractual relationship, for instance, it may be of the utmost economic importance for both parties that the relationship is maintained, and this may encourage parties to consent more easily to compromising agreements.[755]

Accordingly, and especially in a relationship characterised by mutual economic dependence, a framework agreement is, to some extent, itself a adaptation mechanism. This it achieves not by effecting by itself adjustment of price on the materialisation of contingency, but in its encouraging of the parties to effect such adjustment, namely, by renegotiating and contracting afresh.

The extent to which this type of arrangement proves adequate for the purposes of the parties remains, however, to be seen.

6 5 3 Relational contracts and the efficacy of price adaptation

6 5 3 1 The current state of contractual adaptation in contracts of the type of Merks

With respect to the topic of this study, namely, certainty of price and price adaptation, the important feature of *H Merks & Co (Pty) Ltd v The B-M Group (Pty) Ltd* is that despite the apparent efforts of the parties to create a sophisticated agreement to govern their relationship for a period of five years (and one has no reason to doubt that the parties fully intended to be engaged in the relationship for this period of time[756]), their efforts foundered once more on the requirement of certainty of price. In particular, the development of the distributorship relationship was thwarted by the requirement that for this relationship to be maintained for the

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753 See 234J-235A of the judgement.

754 See again e.g. the attitude of the parties in *Build-a Brick BK en 'n Ander v Eskom* 1996 1 SA 115 (O) 129E.

755 See 6 5 1 above.

756 This point, naturally, would more likely be argued by Merks. On the other hand, the case report gives no indication that B-M itself had any other intention at outset than to engage with Merks for a period of five years.

full five years, fresh agreement was required every year on one aspect of the relationship, namely, price. The crucial authority cited by the court, consequently, is not case-law illuminating the concept of a distribution agreement, but old war horses such as *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* and *Hattingh v Van Rensburg.*[757] This is in itself revealing.

On the one hand, one could argue that this is the correct conclusion. If contingencies arose over the course of a year which B-M had not foreseen and which obliged it to raise its selling prices, it would be disastrous for B-M were it to be held to much lower prices for the full period of five years. By requiring agreement afresh each year, the parties were protected from being locked into long contractual relationships governed by terms they did not anticipate. The requirement of certainty of price is consequently fulfilling the task for which it was designed, namely, to ensure that parties are only bound to terms with respect to which they consent. Each year, the parties may tailor a fresh agreement on price to match any change in circumstance which may have arisen during the course of the previous year; there is therefore adaptation of price.

On the other hand, one must consider whether this is quite the most appropriate manner for achieving this small measure of contractual adaptation. More specifically, one might wonder if there is any point in entering into a contractual relationship with the complexity of the one entered into between Merks and B-M and with the expectation that it will endure for five years, if the relationship can be thwarted with the ease of manner as occurred in the *Merks* case. The price of Clairol products to be purchased every year was a crucial term, and being a term perhaps most close to the pockets of both parties, a contentious one. Even if there was expectation on the part of the parties that there would be agreement on price, there must likewise have been the realisation that mere disagreement on this term, a prospect by no means unforeseeable, and the entire contract was sunk. Could optimism really have blinded them to this fact? For this, the court decided, was the intention of the parties. The heavy investment costs incurred by Merks in the expectation of a contract enduring for five years, by for example, the setting up of a selling organisation, would seem therefore to count for nought. Of course, it might be argued here that Merks, as the distributor, is the weaker partner, and that B-M was less dependent on the continuation of the relationship than Merks: there existed other distributors who could be contracted to replace Merks. Consequently security of tenure would be a greater issue to the latter, rather than B-M. This, however, would be to underestimate the disruption that would be caused to B-M's business in the event of it being forced from the relationship with Merks by the failure to agree on new prices for the coming year. The intention of B-M was surely that for a minimum period of five undisrupted years, provision had been made for the marketing of its goods.

The conclusion to which one is inevitably drawn, therefore, is that the agreement, as complex as it no doubt was, nonetheless proved unsatisfactory. Perhaps if circumstances had been slightly different, the parties would have had less difficulty in reaching agreement on price. In this case, the prices agreed upon for the first year were in fact already two years old; the stock sold during this year was warehouse stock, with prices based on their original manufacturing cost.[758] It is possible that the significance of this upon the respective expectations of the

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757 1986 2 SA 555 (A); 1964 1 SA 578 (T).
758 See 230G-H, 231H.

parties regarding future prices was not adequately considered by the parties. In any event, the effect of their agreement was the following. For five years, both parties could compel each other to comply with the mutual obligations incurred by the distribution agreement, but for five years this complex arrangement depended entirely on one crucial point: the parties reaching fresh agreement on prices each year. This same problem, therefore, of providing *flexibility* in the face of contingency whilst simultaneously offering *security*, is encountered as much here as elsewhere.

Flexibility, of course, refers to the ability of the contract to adapt and thus provide adequately for contingency; in the language of that used earlier it refers to the dimensions for adjustment. Security, once more, is referred to here in both senses. In the first sense, it entails the security afforded to parties by the knowledge that will not be obliged to give effect to an adjusted price with respect to which price they would have no intention of agreeing. In this sense, the arrangement provides adequately for security: neither party may at any stage be compelled to accept a price with respect to which it was not happy; if indeed unhappy, it need simply refuse to agree on a new price. This is indeed what happened in *Merks*. The arrangement, however, appears a little less successful in its provision of security of tenure, namely, that despite a flexibility being created with respect to price, both parties may be confident that they remain contractually bound to each other. In the *Merks* case, the confidence of the parties would not be successfully tested beyond a year. Importantly too, relational forces such as an economic dependence and a common need to maintain the business relationship failed to provide adequate security of tenure, and shore up the certainty of future agreement.

6 5 3 2 Conclusion

In sum, therefore, a contract of the type encountered in *H Merks & Co (Pty) Ltd v The B-M Group (Pty) Ltd* does not provide for adequate adaptation of price. Of the core elements said to constitute adaptation, only one is truly satisfied, namely, *security* in the first sense mentioned above. *Flexibility* is provided to a degree, because the parties - thanks to the requirement that they agree afresh on a new price from time to time - may well happen to agree upon such a price in the event of contingency, and one particularly responsive to the change in circumstance.

But at what cost? For this flexibility counts for little if it is not coupled to *security of tenure*. The parties must be confident that consequent to a new price being calculated by whatever mechanism the parties may have agreed to utilise, they will remain nonetheless bound in contractual *nexus*. If this is not the case, there is little point in binding oneself for a lengthy period of time with respect to other terms. One is reminded here once more of the argument by counsel for Merks that it would have been unthinkable for its client to have incurred the costs of setting up a selling organisation with no security of tenure beyond the first year of the agreement.[759] The expectations of the parties, or at least that of Merks, would seem here not

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[759] 234J. In similar vein, see the remarks of all three law lords in *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 2 All ER 216 (CA) at 224C, 230D and 234C as to the improbability of a concessionaire entering into a relationship wherein which a great deal of time and capital would be invested, and much of it in the expectation of the relationship enduring for a significant length of time, without the safeguard that the relationship could not be terminated anon.

to match the strict legal realities of the contract.

Accordingly, it must be determined what other means of adaptation may therefore be incorporated in such relational contracts. In this respect, the usefulness of hardship and intervener clauses has already been discussed above at **6 3**. Secondly, parties may incorporate a contractual clause along the lines of the 'matching clause' found in *Shell SA (Pty) Ltd v Corbitt and Another*.[760] Thirdly, it will be suggested that the solution may be found in the long-term relational contract itself. By this it is meant that the particular *relational context* within which the contract of sale is encountered may permit the implication of reasonableness. Brief attention is thus afforded firstly to the *Shell* case, and thereafter to the question as to whether an alternative construction may be given to the interpretation of the contract in the *Merks* case so as to import this desired aspect of adaptation.

6 5 4 The 'matching clause' in Shell SA (Pty) Ltd v Corbitt and Another

In *Shell SA (Pty) Ltd v Corbitt and Another*[761] applicant, a petroleum company, and respondent, the purchaser of such fuel, entered into a written agreement in March 1980. The agreement was originally intended to expire on 30 April 1984, but it was common cause that it had been renewed until 30 April 1989.

In terms of the written agreement, it was expressly provided that the respondents were to purchase their entire petroleum gas requirements from the applicant, and from no other person, during the currency of the agreement. Over the years, the respondent did indeed comply with this requirement, and it was only in November 1984 that it placed a substantial order for gas with a rival company to the applicant, and informed the latter that they would no longer be doing further business with the applicant. Accordingly, applicant lodged an application for an interdict restraining respondents from purchasing gas from any other source other than the applicant during the currency of the written agreement.

Respondents opposed this application, but ultimately, on one ground only. This was that the contract was void for vagueness and unenforceable because the price of gas to be supplied to the respondent had been left to the arbitrary discretion of the applicant, or, alternatively, because the price to be paid for such gas was in any event undetermined or undeterminable.[762] In this respect, respondent referred to clause 3 of the agreement:

> Prices according to Shell's [i.e. applicant's] latest price list ruling at time. Discounts as arranged.

With regard to the argument that the price of gas was undetermined or undeterminable, the court, per De Kock J, firstly examined the law concerning certainty of price, and noted that price must be either fixed in the contract itself, or that it must be determinable by the application of some external standard on which the parties have agreed. Consequently the court held that by clause 3, the parties had provided the machinery for the fixing of price: they

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760 1986 4 SA 523 (C).
761 Above.
762 525F.

had agreed that the price of gas would be applicant's ruling or current price for such gas as published from time to time in applicant's price list. Price was accordingly determinable.[763]

More interesting, however, would appear to be the primary reason upon which the court based its rejection that the determination of price by reference to the applicant's price list permitted arbitrary price fixing by the applicant.[764] Here De Kock J referred to the so-called 'matching clause' found in the agreement. This clause entitled the respondents to submit to applicant offers by competitors of applicant to supply gas at a lower price. If the applicant preferred to match the lower price, the agreement remained valid at this lower price, but if the applicant was not prepared to match the competitive price, the respondents had the right to terminate the agreement without incurring any liability. Moreover, the 'matching clause' contained an additional formula by means of which the price could be worked out in the event of respondents wishing to dispute the price fixed by the applicant.

The import of such a clause is an interesting one. Throughout the tenancy of the agreement there is a determinable price; this is constantly ascertainable by reference to the applicant's ruling price list. Accordingly, the contractual relationship is provided with security of tenure: the relationship cannot be scuttled by any disagreement on price. The price list, however, is the applicant's. Accordingly, the risk such security of tenure brings is that of possible abuse (which concerns, in the terminology of price adaptation, security in the first sense, viz. the security of not being held to a price to which one would not have intended to have been bound); the applicant could conceivably hold the respondent to unduly high prices contained in the price list. Such abuse however is curtailed by the fact that any price set by the applicant must be *competitive*. Thus if the applicant is not prepared to set a competitive price (which is surely closely related to a market price), the respondent may withdraw from the agreement without incurring liability. Furthermore, a further limit is placed upon the applicant's price-setting power by the additional formula providing for the working out of price.

The 'matching clause' in *Shell SA (Pty) Ltd v Corbitt and Another* is, accordingly, a

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763 526G-527E.

764 527H-I. While it is submitted, with respect, that the judgement in *Shell SA (Pty) Ltd v Corbitt and Another* is a most sound one, it is unfortunate that De Kock J does not distinguish the argument of uncertainty of price from that of the arbitrary fixing of price, as perhaps he could have more clearly done. Thus De Kock J, whilst appearing to regard the reference to the applicant's price list as a reference to an external standard which is required to determine a price without further recourse to the parties, also recognises that the reference to the applicant's price list essentially involves the affording of a price-fixing power to one of the parties. Perhaps the regret is merely that De Kock J did not apply his approach on the facts to the authorities he cites on *pretium certum* (525G-526G). The latter accordingly remain entrenched authority on, for instance, the rule against unilateral powers of price-fixing when, in effect, De Kock J moved considerably down the line towards a qualification of such a rule. See also *Evans Marshall & Co Ltd v Bertola SA and Another* [1973] 1 All ER 992 (CA), referred to under 6 5 2 above, where a distributorship agreement for the supply of sherry was entered into for an initial period of five years, and thereafter a further period of five years unless terminated at the end of the first period. The contract provided that the prices charged by Bertola, the manufacturer, were subject to market fluctuations, but the court held at 997B that these were effectively fixed by Bertola, although subject to the provision that they were to be fixed in conformity with the practice of the Association of Sherry Shippers. It is clear that the court had no objection to this method of price-fixing - see 999D.

sophisticated price adaptation mechanism. In the *Shell* case, moreover, it withstood litigation to enable one party to hold another to a contract which had been intended to be of a long tenure, when the latter party had seized upon the 'lawyer's point'[765] of uncertainty in an attempt to escape the provisions of a contract which it clearly regarded it as binding. De Kock J was clearly not impressed by the respondent's grab at an escape offered by a technical reading of the certainty requirement, and held the parties to their intentions on contracting.[766]

Clauses of somewhat similar effect have been found elsewhere in South African case law. Thus in contracts of sale subject to confirmation, the court will enforce a clause by which the seller, in anticipation of cost increases before delivery, stipulates a right to demand an adjusted price in the place of a price agreed upon, but subject to the purchaser's right to withdraw from the contract if the adjusted price should be unacceptable to him.[767] The 'matching clause' in *Shell*, however, goes somewhat further in that while it too allows a seller (i.e. such as the applicant in *Shell*) to adjust price in the event of cost increases, it is also more likely to ensure that the purchaser will *not* feel itself compelled to withdraw from the relationship (because it is dissatisfied with such increases) by way of the fact that it may require such adjustments to match competitors' prices. Accordingly, a clause such as the one to be found in *Shell* is more likely to provide for the maintenance of the contractual relationship.

6 5 5 The implication of reasonableness: an alternative approach to Merks

6 5 5 1 The arguments of the appellant

The arguments of Merks, the appellant and concessionaire in *H Merks & Co (Pty) Ltd v The B-M Group (Pty) Ltd*, were two-fold.

Firstly, it was argued that in the absence of agreement by the parties on an increase, the previous price remained.[768] Thus if the parties could not reach agreement on an increased price for 1990, the 1989 price would continue to apply. This argument was, of course, dismissed with comparative ease. On both a linguistic and contextual interpretation, this was shown not to be the intention of the parties.[769] If this argument had been accepted, it would, for instance, have had the result that Merks would have had no incentive to agree upon an increased price. This follows from the fact that Merks would have been well mindful that in the event of it refusing to attempt to reach some agreement, resort would inevitably have to be made to the previous year's price - which would, of course, be unaffected by any increase.[770]

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765 See e.g. *Namibian Minerals Corporation Ltd v Benguela Concessions Ltd* 1997 2 SA 548 (A) 557D.
766 See especially 528I-529E.
767 Van der Merwe et al *Contract* 164; *Steens v J Brockhouse (SA) Ltd* 1950 1 PH A4 (C); *Barry Colne & Co (Transvaal) Ltd v Jacksons Ltd* 1922 CPD 372. Also *Diners Club SA (Pty) Ltd v Thorburn* 1990 2 SA 870 (C) for a clause with a similar effect, albeit in a different context.
768 234A-B.
769 234C-H.
770 234E; 234I.

The alternative argument raised by Merks is a more interesting one, namely, that on a proper interpretation of the agreement or on the basis of an implied term, any increase had to be a *reasonable* one.[771] This constituted an objective yardstick by which the increase could be measured, and that therefore the prices for the years following 1989 were ascertainable, and the agreement enforceable. Nestadt JA, however, rejected this contention by stating that even if it was entitled to assume that sale at a reasonable price was a valid one, the terms of the contract expressly negated such an interpretation. The contract expressly stated there was to be agreement on any price increase; the court was accordingly not entitled to substitute this specifically chosen price ascertainment machinery (namely, agreement) with machinery of its own (namely, a reasonable increase, which it in any event regarded as difficult to determine).[772]

On the one hand, this reasoning is, with respect, clearly incorrect. Counsel for Merks did *not* argue that the parties had agreed upon machinery to ascertain price, and where this machinery fails, had then argued that the court was permitted to substitute machinery of its own, and set a price, because the parties, though agreeing specifically on machinery, intended merely that a reasonable price (or increase) be set. Rather, counsel for Merks argued that by an agreement that all price increases subsequent to 1989 were to be reasonable, price was objectively ascertainable, and that accordingly it was enforceable by the court - much like, counsel no doubt added in argument, any other objective price ascertainment machinery such as, for instance, a reference to the market price. There is certainly a difference between the two. Moreover, even though South African courts currently hold that the court may not substitute machinery agreed upon by the parties for their own, when such machinery breaks down (i.e. Nedstadt JA's version of Merk's argument),[773] the decision upon which Nedstadt JA relies in support of this proposition, namely the Court of Appeal in *Sudbrook Trading Estate Ltd v Eggleton*, had already been overturned by the House of Lords precisely on this point.[774]

On the other hand, Nedstadt JA's view that there is no room for the implication of reasonableness is, no doubt, correct on a first reading of the contract. In the words of the contract itself, and thus on a linguistic treatment of the contract, there is no reference to reasonableness. The contract states there is to be agreement, and in accordance with freedom of contract, the parties would therefore be entitled to agree upon an unreasonable increase. In direct contrast, however, to the approach taken by the court to the first argument raised by Merks (namely, that in the absence of agreement, the initial or previous year's price held), the court failed to approach the argument of reasonableness from the perspective of contextual

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771 235B-C.

772 235D-F.

773 See e.g. 2 5 5 above and cases such as *Heyman's Estate v Featherstone* 1930 EDL 105, and *Faatz v Estate Maiwald* 1933 SWA 73.

774 *Sudbrook Trading Estate Ltd v Eggleton* [1981] 3 All ER 105 (CA); [1983] 1 AC 444, [1982] 3 All ER 1 (HL). Ironically, the very line cited by the Appellate Division in the *Merks* case (at 235E) from the Court of Appeal judgement is shown by the House of Lords to involve a fundamental fallacy (i.e. that the court cannot intervene and substitute its own machinery where the party's machinery has failed to set a price, because, apparently, there is not yet a complete agreement as there is not yet agreement on price! Agreement on price was of course reached (and the contract subsequently complete) on the parties agreeing on the objective ascertainment of price). See the discussion at 2 5 4 1 1 above, and the submission that the principles set out by the House of Lords should likewise pertain to South African law (to which see 2 5 4 2 and 2 5 5).

interpretation.[775] Could therefore, a different conclusion be reached from a contextual interpretation to that reached as a result of a linguistic treatment?

One drifts here into tricky waters. Although one is implored to give business efficacy to the interpretation of commercial contracts, one must not nonetheless be seen to make the contract for the parties. Caution notwithstanding, it nevertheless cannot be ignored that the contract was concluded within the context of *a mutual intention to create a long-term, relational contract*.

6 5 5 2 Reasonable increase

One cannot know what evidence was cited by Merks in its argument that any increase was to be a reasonable one. Counsel's argument was not cited in the court report, and moreover, it appears that the argument may not have been a highly substantiated one. The court of appeal noted that it was led as an alternative argument which had not been foreshadowed in the pleadings or raised in the court *a quo*.[776] This may be, conceivably, the reason why it did not enjoy significant examination, at least to the extent as that afforded by Nestadt JA to Merks' first argument. Accordingly, if indications are to be found to validate this particular argument of the appellant's, one must glean them from the court report oneself.

Firstly, contractual context has already been mentioned as an important indication that the parties tacitly agreed that price increases were to be reasonable. There are no indications in the case report other than that both parties envisaged the embarking upon a long-term distributorship agreement. If both parties from outset accepted that there were to be no limits as to what each party might demand at the price increase negotiations each year, than clearly either of the parties could have demanded to pay, or be paid, some absurd sum and thereby deliberately destroy the relationship. Such an interpretation offers absolutely no security of tenure. The application of the so-called bystander test would surely have elicited the reply: no, there must be some limits. These limits would surely be defined by the concept of reasonableness.

Here an analogy could possibly be made with a contract of first refusal, which in the context of sale is usually referred to as a contract involving a right of pre-emption. In terms of the latter type of contract, a party (the potential seller) grants to another a right of pre-emption. By this, the grantor of such a right is not compelled to sell the *merx* concerned, but should he or she decide to do so, he or she is obliged to give the grantee the preference of purchasing, and is accordingly prevented from selling to a third person without having given the grantee the so-called right of first refusal.[777] In *Soteriou v Retco Poyntons (Pty) Ltd* a term of a lease

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[775] At 235E-F the court concludes as follows: 'In our case the determination of a reasonable increase (a difficult task I would have thought) is an alternative which, *on the wording of the agreement*, is not available, either by way of an interpretation or an implication' (my emphasis). See, in contrast, 234B-H where Nestadt JA specifically examined Merk's first argument from the perspective of both linguistic and contextual interpretation.

[776] 235B.

[777] *Soteriou v Retco Poyntons (Pty) Ltd* 1985 2 SA 922 (A) 932 B-E. See in general Van der Merwe et al *Contract* 62 ff.

provided that the lessee would have 'the first refusal of entering into an extension of this lease ... upon such terms and conditions and at such rental as may be mutually agreed upon'.[778] The Appellate Division per Nicholas JA (Botha JA dissenting), having held firstly that there was no difference in principle between a right of pre-emption in the case of sale, and a right of first refusal of a lease, rejected the contention that the clause in particular amounted to an unenforceable agreement to agree and was thus void for uncertainty. Rather, the effect of the contract of first refusal was that the lessor was obliged to make an offer, which the lessee could either accept (in which case the terms and conditions and the rental would be mutually agreed upon), or reject.[779] In this light, the court remarked as follows:

> Poyntons's was accordingly under an obligation to offer Soteriou a new lease of shop 18. Plainly any offer had to be one which was capable of being turned into a contract by acceptance. It had therefore to state a rental and any other terms and conditions which Poynton's required. Nothing was said in clause 2 (b) as to the method of determining the rental to be stated in the offer, but Poynton's was not free to fix any rental it pleased ... Plainly Poynton's must act *bona fide*. Cf. Corbin *On Contracts* ... :
> The law will require performance 'in good faith' and the term 'offer' will be interpreted as denoting one that is not beyond the bounds of commercial reason and practice and made for the purpose of inducing a rejection.

The court thereafter referred to *Manchester Ship Canal Co v Manchester Racecourse Co*, a decision of the English Court of Appeal, whereby a similar clause was held to require the making of a 'fair and reasonable offer' by the grantor.[780]

It is thus suggested that a similar implication could be made in the case of *H Merks & Co (Pty) Ltd v The B-M Group (Pty) Ltd and Another*. For to permit the grantor of a right of pre-emption to make an offer at an unreasonable price would make nonsense of any claim that a contract of first refusal or pre-emption was intended to have any real contractual effect. Likewise, in the light of their envisaged long-term contractual relationship, it would surely be similarly nonsensical to hold that it was not tacitly agreed upon that, in negotiating fresh agreement on a price increase each year, both parties were obliged to act *bona fide* and were not to make offers beyond the bounds of commercial reason that would induce rejection.

At this point, however, a word of caution. In *Soteriou v Retco Poyntons (Pty) Ltd* Nicholas JA held that the grantor of a right of first refusal was to act *bona fide* in the fixing of rental in his offer. In the light of Nicholas JA's consequent references to Corbin and the *Manchester Ship* case, it would appear that by this he meant that the grantor would not be permitted to make an unreasonable offer. While for most intents and purposes, the making of a *bona fide* offer and a reasonable one may amount to much the same offer, a distinction might be that an agreement to make the latter would appear enforceable, while an agreement regarding the former would be not. In the *Merks* case, for instance, one might argue that the parties tacitly agreed *merely* on negotiating fresh agreement in good faith. And even were such an agreement to be recognised in South African law (which would appear not to be the case), it would appear that in any event, both parties *in casu* did in fact make *bona fide* offers.[781] Accordingly, in the

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778 Above.
779 933J-935A.
780 [1901] 2 Ch 37; at 933A-E.
781 See the discussion at 6 5 6 below.

event that following these genuine *bona fide* efforts, there is still no fresh agreement on price, the contract must fail: the parties have not agreed upon a reasonable increase, but merely that their suggestions as to an increase be *bona fide*. On the other hand, should the parties be said to have tacitly agreed upon the making of reasonable offers, this can be held to constitute tacit agreement that, ultimately, a reasonable increase must be set. Thus should the parties fail to achieve such agreement themselves, the court may step in and ascertain the latter.[782] In the latter case, an objectively ascertainable price is set, and in the former case, none. As indicated however, Nicholas JA does seem to indicate that by a *bona fide* offer he entails a reasonable one. In any event, it will be argued below that the parties did not tacitly agree that they were merely to negotiate on an increase in price in good faith, but that any increase would be a reasonable one.

A further analogy may be made with the another decision of the English Court of Appeal, namely, *F&G Sykes (Wessex) Ltd v Fine Fare Ltd*, where the parties had, similarly, entered into a five year contract, but under which the plaintiffs were to supply boiler chickens to the defendants. In the first year of the contract, the number to be supplied each week would not be less than 30 000 and not more than 80 000, and thereafter, 'such figures as may be agreed between the parties'. This clause is not unlike that of the price clause in *H Merks & Co (Pty) Ltd v The B-M Group (Pty) Ltd and Another*, in that it concerns likewise an *essentialé*, viz. the *merx*. Furthermore, in a similar manner to that of the South African case, the contract ran for one year, after which the defendants cancelled and the plaintiffs sued for breach. In the judgement of the Court of Appeal, however, the clause in question was held *not* to make the contract unenforceable for want of certainty. In the words of Lord Denning MR:

> In a commercial agreement the further the parties have gone with their contract, the more ready are the Courts to imply any reasonable term so as to give effect to their intentions. When much has been done, the Courts will do their best not to destroy the bargain ... [W]hen an agreement has been acted upon and the parties, as here, have been put to great expense in implementing it, we ought to imply all reasonable terms so as to avoid any uncertainties.[783]

Likewise, and as a dictum frequently cited by our courts,[784] the words of Lord Wright in *Hillas & Co Ltd v Arcos Ltd* are illustrative:

> Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but, on the contrary, the court should seek to apply the old maxim of English law, *verba ita sunt intelligenda ut res magis valeat quam pereat.* That maxim, however, does not mean that the court is to make the contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as, for instance, the implication of what is just and reasonable to be ascertained by the court as a matter of

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782 See the discussion of a reasonable price at 2 3 2 above.

783 [1967] 1 Lloyd's Rep 53 at 57-58. Lord Denning MR did, however, also note that in the case in question, there was less difficulty than in others as it contained an arbitration clause which, liberally construed, he regarded as sufficient to resolve any uncertainties the parties had left. Nonetheless, the principle above applies.

784 See e.g. *Namibian Minerals Corporation Ltd v Benguela Concessions Ltd* 1997 2 SA 548 (A).

Ondernemingsbestuur

Already during the 1950's there existed a strong economic need for ownership in apartments. In practice developers tried to satisfy such need by means of share block schemes which gave occupants a personal right of use with regard to an apartment by means of shareholding in a company which owned the apartment building. There were, however, certain disadvantages inherent in such personal right compared to genuine ownership. The legislator accordingly intervened and promulgated the Sectional Titles Act, 66 of 1971, which came into operation on 30 March 1973. This Act created an exception to the maxim *superficies solo cedit* and authorised the acquisition of ownership and other limited real rights with regard to part of a building. In terms of a sectional title scheme part of a building utilised as an apartment, business premises or an office can now be acquired in separate ownership. In the course of time certain deficiencies in the original legislation were exposed with the result that while retaining the basic features of the Act of 1971 the Act as such was overhauled in 1986 by the Sectional Titles Act 95 of 1986 which came into operation on 1 June 1988. In these notes we will concentrate on the position in terms of the new Act.

in the vicinity of national parks.

Can be exchanged for residential or office units in a sectional title complex.

(flat or commercial unit0

calculated according to the participation quota of the section (see infra)

adjacent plots of land
because one deals with an intensified community of home-owners in these circumstances.

common or collective owner of the common parts of the sectional title complex namely the land, the common facilities such as the swimming-pool and the tennis court and the common parts of the building which fall outside a section such as the passages, staircase, the lift, foyer etc.

the management of the sectional title community

The trustees can appoint a managing agent and delegate certain of their powers to him or her. The legislative authority rests with the general meeting, which regulates the affairs of the sectional title community by means of resolutions. Each sectional owner has in principle one vote at such meetings except when a poll is demanded in which case the value of a vote corresponds to the participation quota of a section. The annual general meeting must approve the budget for the next year as well as audited financial statements for the past year and elect trustees. A sectional title scheme is controlled by rules. Section 35 provides for management rules (dealing amongst others with the election and duties of trustees and the conduct of general meetings) and conduct rules (which deal amongst others with the keeping of animals, the parking of vehicles, the hanging up of laundry and

the disposal of rubbish). A set of model rules is prescribed by regulation. These can be amended by unanimous (management rules) or special (conduct rules) resolution.

In addition to this, the Sectional Titles Act created anew system of registration of ownership

Instead of a land register as in the case of the registration of land, a sectional title register is opened for every sectional title building with a subfile for every unit in the scheme. Ownership of a section as well as any other real right with regard to a section is registered in the sectional title register. Each sectional owner receives a certificate of registered sectional title as proof of his ownership of his unit. A sectional owner can also register a sectional mortgage bond with regard to his unit as security for a loan from a building society.

> the value of the vote of a sectional owner where special resolutions are put to the vote or where voting is by poll;

the remuneration of auditors or managing agents.

6 THE ESTABLISHMENT OF A SECTIONAL TITLE SCHEME

Subdivision of a plot of land zoned for residential purposes

Mostly (but after 1997 not necessarily) for the purpose of additional facilities.

In terms of the old Act, a building had to be divided into at least two sections, with the result that a sectional title scheme could not consist of a number of free-standing rondawels. Section 2(a) of the new Act now provides that if a scheme consists of more than one building, any such building can be divided into a single section and common property. On account of this, the above restriction is no longer applicable. A building is, however still required with the result that mooring spaces to a jetty can not be sold as sections.

(iv) The developer must consider carefully how the scheme will be financed. In terms of section 26 of the Alienation of Land Act 68 of 1981, the developer is only allowed to receive payment from the purchaser of the unit after the sectional title register has been opened. This can not occur before the buildings in the scheme have been virtually completed. The developer of a large sectional scheme may therefore consider to develop a scheme in phases since the Act allows registration of each phase as soon as it is completed.

(v)

to prepare a draft sectional plan of the land and the building(s).The draft sectional plan must be prepared from actual measurements which presupposes that the buildings must be virtually completed. (section 6(1))

indicates the location and floor area of each section in the building

and he is allowed time to consider whether he wants to purchase his flat. Afterwards he is allowed a period of grace of 6 months to look for alternative accommodation.

(vii) Since the Sectional Titles Act Amendment Act of 1997 the local authority need no longer approve the scheme. However, if the scheme contravenes an operative town-planning scheme or if the building has not been erected in accordance with the applicable building regulations, the developer still have to approach the local authority for a condonation of contraventions.

(viii) The Surveyor-General must then approve the draft sectional plan. This requirement was introduced by the new Act of 1986 in order to ensure that sectional plans are correctly drawn up.

Such as a sectional mortgage bond, a lease etc

Die nuutste wetgewing op die gebied is die Wysigingswet op Deeltitels 44 van 1997 wat die bepalings van die Wet sroomlyn en op sekere punte moderniseer.

Sedert 1997 kan uitsluitlike gebruiksgebiede in die modelrëels van die skema of aan die begin deur die ontwikkelaar of later deur die regspersoon by wyse van eenparige of spesiale besluit gevestig word. In sodanige geval verwerf die houer van die reg bloot 'n persoonlike reg en nie 'n saaklike reg nie.

Die wetgewende gesag van die regspersoon berus by die algemene vergadering wat die deeleiendomsgemeenskap deur middel van rëels bestuur.

Daarna word 'n grasie-periode van drie maande aan hom toegelaat om alternatiewe huisvesting te soek.

(viii) Die Landmeter-Generaal moet dan die konsepdeelplan goedkeur. Hierdie vereiste sorg dat deelplanne uiters noukeurig opgestel word.

> machinery where the contractual intention is clear but the contract is silent on some detail. Thus in contracts of future performance over a period, the parties may not be able nor may they desire to specify many matters of detail, but leave them to be adjusted in the working out of the contract. Save for the legal implication I have mentioned, such contracts might well be incomplete or uncertain; with the implication in reserve they are neither incomplete nor uncertain, As obvious illustrations I may refer to such matters as prices or times of delivery in contracts for the sale of goods ...[785]

It is clear, therefore, that there is precedent for the courts finding for the tacit implication of reasonableness. Nor, furthermore, should this be as the result of a court's application of an (unduly?) *objective* test for tacit terms.[786] For in the case report of *H Merks & Co (Pty) Ltd v The B-M Group (Pty) Ltd and Another* itself, there are additional factors which cumulatively point to a conclusion that the parties tacitly agreed that the any increase in price would be a reasonable one. Here one may refer to the evidence of an employee of Merks that in previous dealings with the B-M Group, price increases had always been reasonable increases in line with inflation.[787] In this respect it would appear that, prior to the sole distributorship agreement entered into in late 1988, Merks had been a distributor for B-M for approximately two and a half years.[788]

Moreover, the tone of the contract throughout indicates the primacy of the five-year distributorship agreement, and that agreement on price was expected to comply with this long-term intention. Accordingly, clause 3 begins:

> This agreement shall have a tenure of five years.

In contrast, clause 4 states as follows:

> The transfer price may be increased by mutual agreement from time to time. Such increases will only be effected at reasonable intervals, taking cognisance of the effect they may have on the prevailing market conditions ...

Clearly, there are limits on any price increase. Whereas the distributorship agreement *shall* have a tenure of five years, it is stated that there *may* be price increases. The supremacy of the five-year distributorship agreement is established. These increases, moreover, were only to be at certain times and crucially, had to take into account market conditions. Any price increase, in other words, had to be *market-related*; a limit is clearly placed on the increases envisaged.[789] That Merks had market conditions in mind throughout is evident in its constant

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785 [1932] All ER 494 (HL), (1932) 147 LT 503H-J.

786 See 5 3 1 above on the court's use of an objective test for tacit terms so as to import an element of price adaptation.

787 234H.

788 228I-J.

789 There is admittedly an ambiguity in the second sentence of clause 4. Market conditions might, for instance, only need be taken into account with respect to the *intervals* chosen when introducing the price increases. The price increases themselves could be interpreted as *not* being subject to the market-relatedness limit i.e. no limits are placed on the price increases. Even if this is the true construction, it still indicates that the parties agreed that the prices, *after* such increases had been taken into account, were to remain competitive - for why otherwise should these conditions then be considered? The parties must obviously have had competitiveness in mind. Competitiveness,

reference, during its price negotiations with B-M, to whether the consumer would be able to afford the increased prices.[790]

Accordingly, therefore, the whole tenor of the agreement indicates that neither party had *carte blanche* in proposing a price. There were limits imposed upon any price increase, and these limits were imposed by market conditions and the recognition that the primary intention of the parties was to engage in relationship for a period of five years. Both parties had to bear in mind that, ultimately, any price agreed upon had to relate to prevailing conditions in the market. This is not to say that the new price had to be the current market price; the latter; however (or at least market conditions), appears to be a determinant of the price increase, and can usually be regarded as an important indication of a reasonable price.[791]

In sum, it would therefore seem that there are indications that the parties may be said to have tacitly agreed that price increases were to be reasonable. If this is indeed the case, and provided that our law's position with regard to a reasonable price (or increase) follows the approach set out in **2 3 2** (and thus confirms Nedstadt JA's apparently reluctant assumption), there would appear to be much to be said for the alternative argument advanced by Merks: viz. that there would consequently be an objective yardstick by which to judge price, and that the price for the years following 1989 were accordingly ascertainable. A final obstacle, however, stands in the way of such recognition. This would be that the approach above has to be reconciled with the express stipulation by the parties that prices 'may be increased by mutual agreement from time to time'.[792] If, as suggested, there existed agreement by the parties on price increase *from outset*, namely, that all increases were to be reasonable, what would be the function of this *later* agreement by the parties? What is there to agree upon if there is *already* tacit agreement on price increase?

The answer to this depends upon the crucial recognition that a reasonable price does not necessarily constitute one specific price only. On the contrary, it constitutes *a range of prices*. *Corbin on Contracts* in this respect observes the following:

> It cannot properly be assumed that only one price or wage is reasonable under the particular circumstances of any case.[793]

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however, is not just a function of strategic timing i.e. when the new prices are introduced; it depends at the same time on the amount of the increases. For it would serve very little purpose if the parties took into consideration prevailing market conditions (e.g. a bonanza season) when determining at what period of time they would introduce the new prices if these prices were then ridiculously high and out of all proportion to those asked by competitors. There would then be simply no point to this clause in the contract. In any event, it was common cause that such intervals had already been set, viz. intervals of twelve months. If then this had been agreed upon in advance, it could not be said that the *intervals* had been determined by taking into consideration prevailing market conditions. What then was to be determined with such conditions in mind? There can only be one answer: the increases themselves.

790 231I-J.

791 See e.g. *Lobo Properties (Pty) Ltd v Express Lift Co (SA) (Pty) Ltd* 1961 1 SA 704 (C) 709A. Also the incisive observations of Corbin *On Contracts* 580.

792 230G.

793 Corbin *On Contracts* 595, where it is noted, further, that reasonableness is a matter of opinion, and opinions differ, even though they are equally honest and well-informed. Nonetheless Corbin (at

Consequently, the later act of agreement by the parties fulfils two roles.

Firstly, it does not dispute that there already exists agreement on price, namely, that all increases are to be reasonable. Its function, rather, is to delegate the final act of *quantification* specifically to the *parties*. In other words, the task of specifying what precise amount constitutes a reasonable increase is left to the parties, and not to, for instance, the courts.

Secondly, and very closely related to the first function as mentioned above, this specific act of agreement (which in the *Merks* case can be expected to occur once a year) constitutes a *refinement* of a price already agreed upon. It constitutes *selection* from a range of prices which collectively comprises what we term a *reasonable price*. It might thus be regarded as the final fine-tuning of an earlier agreement.

Here, this second function referred to immediately above discloses an important point. Refinement by way of later agreement contributes to *price adaptation*, in that it *culminates* a process of price adaptation *originally initiated* by the parties agreeing on a reasonable price. For the moment the parties agree, whether tacitly or expressly, that any price adjustment must be determined by the concept of reasonableness, they immediately incorporate a measure of price adaptation. Agreement on reasonable price constitutes a near perfect price adaptation mechanism. What may be said to constitute a reasonable price one year may be very different from what might be regarded as a reasonable price in another; for in the interim a host of contingencies may have arisen. It is, however, this apparently fickle nature that is precisely the value of a reasonable price. It tracks the ebb and flow of circumstance, and as a consequence, adjusts and adapts continuously and automatically so as to reflect perpetually throughout what might be termed a reasonable price in any circumstance, and at any given time. Accordingly, the act of selection from the price range said to constitute a reasonable price amounts to the final refinement of this process of price adaptation.

6 5 6 The Merks *case and price adaptation: final synopsis*

In *H Merks & Co (Pty) Ltd v The B-M Group (Pty) Ltd* it was envisaged that a more comprehensive agreement would replace the parties' original contract document.[794] This, however, was never concluded. One speculates as to what the parties might have stated therein, and how this might be viewed against what the analysis in this study suggests the intentions of the parties had been. Nonetheless, the above analysis is submitted to be a useful one, if not specifically with regard to the contract contained in *Merks*, then to relational contracts of similar kind.

Amongst other things, it reveals, firstly, that reasonable price itself constitutes a useful price adaptation tool. As observed above, reasonableness keeps abreast of contingency and adjusts accordingly. Its strength is its *flexibility*. An agreement, for instance, on a reasonable price is a

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e.g. 568, 580) regards a reasonable price as generally ascertainable. On the recognition that an agreement on a reasonable price or rental may constitute agreement on a price range or bracket, see also Kerr *Sale* 239.

[794] 229E.

simple enough contractual mechanism for the ascertainment of price that year by year may be incorporated into a contract unchanged; but year by year, even day by day, its application might result in a figure remarkably different from its previous ascertainment. If one has confidence in the various authorities set out earlier in this study, namely, that a reasonable price (or a reasonable adjustment) is an objective yardstick sufficiently ascertainable,[795] then agreement on a reasonable price provides a flexibility most useful for price adaptation.

It might be argued, of course, that even given the authority indicating reasonableness to be a sufficiently ascertainable standard, such an approach is blind to the practical difficulties encountered in attempting to determine what amounts precisely to a reasonable price, or a reasonable increase. This, for instance, may help to explain the apparent reluctance of the court in *H Merks & Co (Pty) Ltd v The B-M Group (Pty) Ltd* to delve more deeply into the question of reasonableness. The court in this case remarked in passing that the determination of a reasonable increase appeared, *in casu*, to be a difficult task indeed. What for instance was to be regarded as the decisive factor in this determination? Merks argued this to be inflation. B-M, on the other hand, referred to the fact that prices for 1989 were already two years old, in that the goods sold during 1989 were warehouse stock, with prices based on their original manufacturing costs. Most products to be sold during 1990 were, however, no longer warehouse stock; they had been recently manufactured. The new prices were thus not to reflect inflation; they reflected the rise in manufacturing costs since the original warehouse goods had been manufactured, and effectively represented the cost of the goods currently being sold. It is clear therefore that both parties believed they had good grounds to believe that they were being reasonable in their demands.[796]

In general, however, this problem is more apparent than real. An important point, after all, is to appreciate that reasonableness needs seldom be determined by the court. Relative to the number of contracts which do incorporate a reference to reasonableness, the court is not frequently faced with a situation as that faced by it in *Merks*. On the contrary, the court only has a role to play when it is made aware that there is disagreement between the parties on this aspect. It is therefore only on those few occasions where agreement cannot be achieved, and the court is in fact approached, that the court will be obliged to provide an indication as to that which amounts to a reasonable price (or a reasonable price adjustment) under the circumstances. This it should be permitted to do because, in principle, depending upon the particular circumstances of each case, the latter is ascertainable or determinable by the court.[797]

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795 See again 2 3 2.

796 This observation allows one to point out that it is not necessarily the point of view of this study that the price increase proposed by Merks should be taken as the reasonable, and hence binding, increase. If the alternative approach set out above was followed the court may well have found that B-M's price adjustments were reasonable in the circumstance, and Merks' demands unreasonable. This might follow, for instance, by the neglect, in particular, of Merks to consider that, knowing the 1989 prices to reflect out-dated manufacturing costs, consequent price increases (for the second year at least) could not be expected to reflect merely inflation. By refusing to agree on a reasonable increase, therefore, Merks might have been held to have repudiated, and the court could have ordered, for example, specific performance on the basis of the price increases proposed by B-M. This, however, one cannot know because the court found it unnecessary to determine reasonableness in the circumstances.

797 See again the discussion of agreement on a reasonable price at 2 3 2 above.

In this eventuality, the task of the courts, in any event, may be greatly eased by requiring the parties to lead evidence as to an accurate estimation of a reasonable price. Having presumably engaged in a period of negotiation in an attempt to reach consensus on price, one may further presume that the parties, during the course of this negotiation, will have exposed most factors which might have a bearing on this calculation.[798]

Secondly, by accepting the construction that the parties in *Merks* (or contractants in similar circumstances) had tacitly agreed on a reasonable price (or alternatively, on reasonable increases), the required *security of tenure* so evidently lacking in relational agreements of the strictly framework type is imported into the relationship. Consequently, in the event of the parties failing to reach agreement on a price increase, the entire relationship is not negated, as the court may ascertain what constitutes a reasonable price or a reasonable price increase in question.

This, in fact, was the successful argument used by the B-M Group in the *Merks* case; B-M simply made use of this lack of security of tenure and proved that the contract had been terminated - an event which consequently destroyed the entire relationship existing between the two parties. In the alternative approach to *Merks* set out above, irrespective of whether there is a later act of refinement by the parties (that is, final *selection* by the parties from the range of prices said to constitute a reasonable price) or not, there still, and always, exists the original, residual agreement, namely, agreement on a reasonable price/price increase. Consequently, security of tenure does not depend upon a continuing series of individual agreements on price. Accordingly, rather than viewing the relationship as comprising of a framework agreement and in addition a series of contracts of sale, one might instead envisage a framework incorporating a single long-term contract of sale. The crucial difference now, however, is that adequate provision has been made for adjustment of price. This allows the parties to be confident that they will be bound throughout this period within a relationship based on reasonable terms (that is, terms with respect to which they would have agreed upon; *security*, in other words, in the first sense), and incorporating a contractual term governing price which might be regarded as *flexible* enough to cover most contingencies. In short, adaptation has been provided for in the fullest sense of the word.

6 5 7 Conclusion

In long-term relational contracts of the type encountered in the *Merks* case, planned and controlled adaptation in the face of contingency whilst ensuring that both parties enjoy security of tenure, and the security of the knowledge that they will not be held to terms with respect to which they would never have an intention of agreeing, is, it is submitted, a realistic assessment of the outlook of the parties. Where possible, it is this intention of the parties to which effect should be given. Parties, especially lay businessmen, should not be penalised for their lack of sophistication in their attempts to reflect this.

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798 See e.g. Kerr *Sale* 51; Lubbe 1987 *AS* 138.

CHAPTER SEVEN: CERTAINTY RECONSIDERED

7 1 Introduction

In *Banque Brussels Lambert SA v Australian National Industries Ltd* the New South Wales Supreme Court expressed itself as follows:

> [t]he whole thrust of the law today is to attempt to give proper effect to commercial transactions. It is for this reason that uncertainty, a concept so much loved by lawyers, has fallen into disfavour as a tool for striking down commercial bargains.[799]

It is hoped that such sentiment can now be said to reflect the attitude of the South African judiciary. Judging by remarks to be found in a recent Appellate Division decision,[800] this may well be the case. However, it was not long ago that a case such as *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* granted relief to a party who based his defence on the nullity of his contract as a consequence of uncertainty of price, in a judgement which, ironically, was regarded of being of such soundness, that it has since come to be regarded as a leading decision on the rule of *pretium certum*.[801] That such technical points could be taken indicates the discrepancy that has existed, and yet not necessarily judicially identified, between what the parties may perceive as a certain price, and that perceived by the court, and that the perception of the latter has been regarded as the sound one.

Much of the cause of this problem is possibly not of the courts' own doing. The courts have inherited a collection of the general principles of contract which, as has been pointed out by Eisenberg, were developed for a model of contract which, in the modern commercial world, must be judged to be the exception, not the norm.[802] The rule of *pretium certum* was developed by the classical law with the idea of the discrete contract in mind; accordingly, it reflects the intolerance of classical law for indefiniteness. Granted, much can still be said that in the fixing of such a rule, the law wished to protect parties from being bound to terms in contracts with regard to which there was no consensus; hence the requirement that terms be certain or objectively so. On the other hand, however, the commercial world is no longer a large Roman *forum*, and contracts are not overwhelmingly of the discrete type. The contractual environment is increasingly characterised by contingency, and parties find themselves frequently involved in contractual relationships that extend beyond the mere exchange of performance.[803] As relationships extend into time, and the parties find the balance they established at outset between performance and counter-performance increasingly threatened by some change in circumstance, parties often feel the need to provide for their

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799 (1989) 21 NSWLR 502.

800 *Namibian Minerals Corporation Ltd v Benguela Concessions Ltd* 1997 2 SA 548 (A); see the discussion of this case at 7 3 2 below.

801 1964 1 SA 669 (W); and see in particular the discussion at 1 2 4 above.

802 *Relational Contracts* 298.

803 That is, that modern contracts are increasingly relational, and not discrete: again, Eisenberg *Relational Contracts* 299.

future performance with flexibility. In trying to do so, however, a party may find his or her attempts come up against the requirement of certainty. It is a delicate balance. On the one hand, parties may see much sense in the law's insistence that for the parties' own sakes, it does not give effect to contractual consequences with regard to which the parties never intended. Accordingly, it would not be in their interests for the certainty requirement to be dispatched too hastily in entirety. At the same time, however, they do not wish to be landed with contractual obligations which reflect the circumstances of an environment since passed, i.e. the one under which they contracted, where circumstances have since changed drastically.

In Chapter 3 these various considerations said often to be in the minds of the modern contractant were termed, collectively, as the desire to provide for *contractual adaptation*; that is, for controlled planned contractual adaptation in the face of a contractual relationship involving the threat of contingency. In the chapters that followed, an overview was given of the various means by which either the law or the parties themselves have attempted to provide for this in the particular sphere of price in the contract of sale. Thus in Chapter 5 the focus was on price adaptive measures provided by the law; in Chapter 6 the focus was on those provided by the parties themselves.

What can now be noted, therefore, is that instances in which price has been held to be uncertain, and the contract accordingly void, often concern attempts by parties to provide for contractual adaptation. Here then in practice the rule of *pretium certum* has been of direct effect on price adaptation. Thus in *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* it was an uncertainty of price resulting from the loose-ended nature of price adjustment clauses that resulted in the contract being held void.[804] That similar price adjustment clauses could, on the application of the rule of *pretium certum*, suffer this same fate was raised by the Appellate Division in *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd.*[805] Likewise in *H Merks & Co (Pty) Ltd v The B-M Group (Pty) Ltd and Another*, by the drafting of a detailed concessionaire agreement, it has been argued that the parties certainly intended some form of price adaptation.[806] Here too, however, the contractual relationship is terminated for want of certainty on price. On the other hand, however, there have been cases of contracts which feature some attempt by the parties to provide for contractual adaptation, but where parties have made unsuccessful claims of invalidity on the basis of supposed vagueness of price. Importantly, not only have many of these courts not been fooled by the lawyer's point of uncertainty, but, simultaneously, have contributed substantially to the development of a more refined rule of *pretium certum*. Thus, for instance, in *Genac Properties Jhb (Pty) Ltd v NBC Administrators CC* the Appellate Division has finally opened the way for the recognition of an agreement of sale at a reasonable price.[807] *Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd, Proud Investments (Pty) Ltd v Lanchem International (Pty) Ltd*, and *Benlou Properties (Pty) Ltd v Vector Graphics (Pty) Ltd* all indicate a more flexible approach to the unilateral power of a party to fix or adjust price, whilst also preventing parties from escaping from the consequences of their contractual liability on the basis of uncertainty.[808] *Shell SA (Pty) Ltd v Corbitt and Another*

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804 1964 1 SA 669 (W); see the discussion at 1 2 4 above.
805 1986 2 SA 555 (A); see the discussion at 6 4 3 2 above.
806 1996 2 SA 225 (A); see the discussion at 6 5 3 above.
807 1992 1 SA 566 (A); see the discussion at 2 3 2 above.
808 1991 1 SA 508 (A); 1991 3 SA 738 (A); 1993 1 SA 179 (A). See the discussion at 6 4 5 3 above.

likewise refuses to be taken in by the claim of uncertainty and, instead, gives recognition to a particularly sophisticated adaptation mechanism.[809] Thus it is often so that in redefining the hitherto undoubtedly restrictive scope of *pretium certum*, these courts simultaneously indicate to parties the ways in which they may import a greater measure of flexibility with regard to their agreements on price; that is, they indicate the means by which they may safely provide for price adaptation.

Consequently, one must conclude that there has been welcome development in our courts' application of the rule of *pretium certum*, and this directly affects the opportunities afforded parties to provide for price adaptation. Our courts do appear, in general, to be more receptive to the parties' motivations in wishing not to be bound too awkwardly, and too soon, to a fixed price. This is, in fact, all that perhaps is necessary, viz. that the courts take into greater consideration the intentions of the parties, and not to remain fixated on the idea that flexibility cannot exist alongside a sufficiently strict requirement of certainty of price. McKendrick, for example, is convinced that parties are on their own capable of inserting in contracts their own provisions which will provide the necessary flexibility to adapt their contract to changing circumstances.[810] All that is asked is that the courts be aware of the reasons why parties create these provisions, and consequently, that they will not be too astute in striking out such clauses on the grounds of uncertainty. This seems to be a fair call.

On the other hand, in South African law as it stands, a judgement (or perhaps more accurately, an outcome) such as that found in *H Merks & Co (Pty) Ltd v The B-M Group (Pty) Ltd and Another* will remain possible. In substance, *Merks* might appear sound in law. On a linguistic treatment of the contract at issue, there was no ambiguity, and the contract explicitly provided for the further agreement on price. Perhaps the only fault of this case is that it failed to take advantage of methods of importing the adaptation potential - such as the recognition of a tacit or *ex lege* implication of reasonableness - which, it seems, was intended by the parties. This, perhaps, was open to it if it had gone a little further in ascertaining the intentions of the parties, or their motivations in entering into the concessionaire agreement. But in the absence of ambiguity, it may well be that it was not necessarily required to do this.[811] Nonetheless, if greater emphasis were *required* to be placed on the intentions of the parties, and in particular, that they had intended to contract for five years, a more realistic, even inevitably fairer solution to this case could perhaps have been found.

Accordingly, in the remaining sections of this final chapter, it shall be seen if the rule on certainty of price can be restated in such a way that the insights gleaned from the examination of the concept of contractual adaptation will take on a greater prominence in our court's approach to certainty, and to *pretium certum* in particular. Here it is interesting to note that Eisenberg has called for a restatement of the general principles of contract, or rather, that they be made to fit the relational, and not exclusively the discrete, contract.[812] The former (which he distinguishes from the latter in that it involves a relationship between the parties and not merely an exchange) he calls the 'bread and butter of contracting'. Consequently, amongst a host of suggestions, he proposes that the general principles of contract recognise rules that

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809 1986 4 SA 523 (C); see the discussion at 6 5 4 above.
810 *Regulation* 332-333. See the discussion at 5 5 above.
811 See e.g. *Delmas Milling Co Ltd v Du Plessis* 1955 3 SA 447 (A).
812 *Relational Contracts* 298-299.

would soften the bite of the classical law's intolerance for indefiniteness and agreements to agree.[813] McKendrick, on the other hand, seems to think that a general rule in the form of § 2-204 of the American Uniform Commercial Code might provide a unifying basis in English law to combat the piecemeal approach to certainty by the English courts.[814] Accordingly, a good start may be to view the American approach to certainty.

7 2 *Pretium certum* in the law of the United States, and its application to South African law

7 2 1 The Uniform Commercial Code

In the United States of America, the enactment in almost all states of the Uniform Commercial Code has served to ameliorate many of the apparently harsh decisions of pre-Code common law on price.[815] Under pre-Code common law, the position was much like South African law at present: broadly speaking, for a contract of sale to be enforceable, price was required to be certain or objectively ascertainable.[816] Pre-Code commercial law was, consequently, replete with litigation concerning the uncertainty of price, and such litigation was accompanied by a high degree of frustration experienced by the parties and inconsistency in judicial interpretation.[817] The position in pre-Code American law may thus perhaps be said to match the unsatisfactory state of affairs in the current South African law of sale. Today, however, the position is such that this particular aspect of the law of sale is noted for the paucity of litigation it produces.[818] Accordingly, the provisions governing price in the Uniform Commercial Code bear repeating. Section 2-204, subsection (3) of which pertains to all terms in contracts of sale, provides thus as follows:

> Formation in General
>
> (1) A contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.
>
> (2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.
>
> (3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain

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813 Ibid. He also suggests that rules could be introduced to impose upon parties to a relational contract a duty to bargain in good faith to make equitable price adjustments when changed circumstances occur, and perhaps even impose upon the advantaged party a duty to accept an equitable adjustment proposed in good faith by the disadvantaged party. A further submission is that courts be permitted to adapt or revise the terms of ongoing relational contracts, including price terms, based on changed circumstances in such a way that a loss that would otherwise fall on one party is shared, by reducing the other party's profits (299).

814 *Contract* 54.

815 Williston *On Contract* 425.

816 On the position in pre-Code law, see Williston *On Sales* 317-322.

817 See e.g. Williston *On Sales* 317.

818 See e.g. Williston *On Sales* 326.

basis for giving an appropriate remedy.

§ 2-305 thereafter provides as follows:

> Open Price Term
>
> (1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if
>
> (a) nothing is said as to price; or
>
> (b) the price is left to be agreed by the parties and they fail to agree; or
>
> (c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.
>
> (2) A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.
>
> (3) When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other may at his option treat the contract as cancelled or himself fix a reasonable price.
>
> (4) Where, however, the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract. In such a case the buyer must return any goods already received or if unable so to do must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account.

In the view of Williston, §§ 2-204 and 2-305 follow the overall philosophy of the drafters of the Uniform Commercial Code, that is, to establish and adopt a set of rules that was practicably workable for the ordinary businessman in a contemporary business environment.[819] With regard in particular to § 2-204 (3), two questions are asked, viz. (i) did the parties intend to contract, and (ii) whether there is a reasonably certain basis for giving an appropriate remedy. This section applies to all terms in the contract of sale, and may be regarded as the general rule on certainty;[820] as shall shortly be seen, the rule on *pretium certum* in § 2-305 is a development upon this general rule.

The primacy enjoyed by the intention of the parties is apparent in § 2-204. Accordingly, the Official Comment to this section observes that if the parties intend to enter into a binding agreement, subsection (3) recognises the agreement as valid in law, despite missing terms, if there is any reasonably certain basis for granting a remedy. It is suggested that this statement of the primacy of the intention of the parties is an important pointer to the proper perspective to be taken of the certainty rule in South African law.

On the one hand, it may be said that in principle, the point of departure in South African law on certainty differs little from that found in UCC § 2-204. In Chapter 1, it was emphasised that, in accordance with the principle of party autonomy, South African courts will strain to

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819 Williston *On Sales* 323.

820 See here § 2-204, Official Comment, and the view that this section provides for commercial standards to govern on the question of indefiniteness or uncertainty.

give effect to the intentions of parties, where such parties intend their agreements to have binding, contractual effect. As in American law, the intention of contractants appears to enjoy primacy. At the same time, however, the test for certainty in South African law has consistently been held to be whether the terms of an alleged contract are enforceable by the courts; this, as indicated in **1 1 5**, is the one and only test for certainty. Such a test, on a broad level, amounts much to the same as asking, as asked in the Uniform Commercial Code, whether there is a reasonably certain basis for giving a remedy, on the terms disputed as uncertain or indefinite. In South African law, however, it is the latter test which is regarded as the only *test*; the requirement to give effect to the intentions of the parties is, at most, a *directive* (albeit well-recognised as a fundamental one). Thus it may be that, unwittingly or unintentionally, in the application of the test for certainty in South African law, undue emphasis is given to, in terms taken from the Uniform Commercial Code, whether there is a reasonably certain basis for a remedy to be given, at the expense of whether the parties intended to contract.

In **1 1 5**, questions were raised as to the basis of the test for certainty in South African contract law. On the one hand, the test was recognised as understandably and sensibly a practical one. Where, for instance, a party to a contract refuses to perform, his or her co-contractant may turn to the court for enforcement of their agreement. The contract must be therefore of a reasonably certain basis for the court to provide a remedy. The court's view in this sense as to what is uncertain or indefinite is indispensable. On the other hand, it was queried why, in the light of the underlying principle of autonomy, the decisive view in the test is entirely that of the court, and not of the parties'. On an application of the test for certainty as it now stands, it appears a court primarily looks to see whether from its perspective, the terms of a contract are certain enough to be enforceable, and not necessarily whether from the perspective of the parties', the contract is exigible. A court may, of course, on its own initiative, and in accordance with the directive to give effect to the intentions of the parties, consider the view of the parties as to certainty of terms. But such consideration is not expressly or adequately emphasised in the test for certainty in its present form. And a failure by the courts to make such a consideration, and possibly to conclude that, despite the court's own initial views on the indefiniteness of terms, the parties are happy to continue the relationship on the basis of these terms, may result in a court not going that little bit further in any attempt to find for a reasonably certain basis for the enforcement of the contract. Yet this what courts should be doing: they should strain to give effect to agreements on terms intended to be binding by the parties. Thus the test for certainty in current form does not emphasise the importance of intention to the extent that this is done so in the Uniform Commercial Code, or the degree to which the courts should endeavour to find a reasonably certain basis for a remedy. Accordingly, it is not suggested that the test for certainty in the South African law of contract is wrong, but that in its expression, too little emphasis is placed on, where possible, giving effect to the intentions of the parties.

In § 2-305, the so-called open price term in the Uniform Commercial Code, the primacy of intention is likewise evident, especially in subsections (1) and (4). The section applies where, while price is not settled, the contract of sale is nonetheless intended by the parties to be binding. Thus parties may conclude a contract of sale under circumstances anathema to the traditional rule of *pretium certum* in both pre-Code American law and South African law. A sale is consequently recognised, for example, where nothing at all has been said or tacitly agreed upon with regard to price, or where they agree to agree later on price, or even where

one party is afforded the unilateral power to set price.[821] Accordingly, the Official Comment to this section states that recognition is thus given to the dominant intention of the parties to have the deal continue to be binding upon both.

Such a position, of course, presents little problem where the contract of sale is not required to be enforced by the courts, and the parties perform satisfactorily, despite the basis of price being one which traditionally the courts would not regard as *certum*. This would seem to confirm the observation in **1 1 5** that there appears to be little sense in a substantive test based upon a price's enforceability by the courts where despite agreeing on a price term which would fail such a test, the parties nonetheless perform. But where such a contract does indeed come before the court for enforcement, and the court finds that no price was settled upon, § 2-305 provides *in any case* for a reasonable price at the time for delivery. Thus, in the event of the contract being brought before the court by one of the parties for enforcement, in terms of § 2-305 (1) the court is afforded - in the language of § 2-304 (3) - a 'reasonably certain basis for granting an appropriate remedy', i.e. it may hold the price to be a reasonable one at the time for delivery.[822] Thus where the parties omit to include a price in their agreement, leave price to be agreed at some later stage and fail to do so, or provide for price to be fixed by some agreed market or other standard or by a third party and the price is not set in such a manner, the contract of sale may nonetheless be enforced on the basis of a reasonable price.

The threshold for this gap-filling function[823] of the Code is whether the parties intended to contract, despite this absence of settlement on a price.[824] Thus not every agreement with an open price term (e.g. where price is not settled) will result in the law substituting a reasonable price; the parties must intend to be bound despite the absence of a settled price. Thus under some circumstances the postponement of agreement on price between two parties (i.e. an agreement to agree), or the omission of price may rather mean that no deal has in fact been concluded.[825] In such a case, the Code will not provide for a substitute reasonable price. This is likewise emphasised in subsection (4). Indeed, Williston observes that this subsection guarantees the parties full freedom to contract, i.e. the freedom to contract under the stipulation that they will *not* be bound until price *is in fact settled*, and not when the Code 'settles' such price itself by the substitution of a reasonable price.[826] In all cases of course, the intention or lack of intention to be bound is a question of fact to be determined by the court.[827]

Thus what may be learnt from UCC § 2-305, bearing particularly in mind that there are certainly similarities between the position in pre-Code American law and the general rule of *pretium certum* in South African law today? In this respect, Williston notes as follows:

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821 Where one party is afforded the power to set the price, this must be done in good faith: § 2-305 (2).

822 The concept of a reasonable price has been developed further by the courts. Thus in e.g. *Lamberta v Smiling Jim Potato Co* 25 Agricultural Dept 1181, 3 UCC R S 981 (1966) the court took cognisance of not only the time but also the place of delivery in determining a 'reasonable price'.

823 Williston *On Contracts* 426.

824 Williston *On Sales* 323.

825 § 2-305, Official Comment 2.

826 Williston *On Sales* 325.

827 Williston, ibid., at 323.

> A principal advantage of this particular Code section over the pre-Code law is the consistency of decisions falling within § 2-305. The Code set out specific guidelines for judicial interpretation that make possible greater consistency in the determination of similar cases. Where, under the common law, a court would conclude an indefinite price term contract enforceable only if an objective, observable, ascertainable standard could be found, the courts are now faced with the less difficult problem of determining if the parties intended to make a contract. Once this preliminary question is disposed of, the price may then be found by reference back to the Code.[828]

The switch in emphasis is obvious, and crucial. Under pre-Code law, and current South African law, parties are, in effect, required to step into the shoes of the courts and to make price ascertainable from the point of view of the latter. The extent to which they achieve this, and not their intention as to their agreement, is the decisive factor as to the enforceability of their agreement. In a sense, parties to a sale are obliged to keep one eye always on the courts. Under § 2-305, on the other hand, the court jumps ahead and determines, firstly, whether - despite the apparent uncertainty of price - the parties intended to contract. Having ascertained this intention, the court is then in a position to decide whether it may assume that the parties intended to contract on the basis of a reasonable price at the time for delivery (which will then be supplied for the parties in terms of § 2-305 (1)) or whether, on the basis of § 2-305 (4), the parties did not intend to be bound in the absence of their own self-caused final settlement of price. Clearly, such an approach goes some way in acknowledging that the agreement is essentially that of the parties', and that it is primarily to the intention of the latter that the courts should bow, and not the other way round.

7 2 2 Sections 2-304 and 2-305 and price adaptation

What then are the implications of §§ 2-304 (3) and 2-305 for the concept of price adaptation? And are any of application to price adaptation in South African law? Here, a number of points spring to mind.

Firstly, and perhaps most obviously, § 2-305 greatly reduces the possibility of uncertainty of price leading to the striking down of the contract. *As a settled price is no longer a prerequisite* (provided the parties intend to conclude a contract), the parties have much greater flexibility in arranging their affairs (including any agreement, or lack thereof, as to price) without fear that this flexibility will lead to their contract being deemed void. In particular, § 2-305 places at the parties' disposal a whole host of adaptation mechanisms. Thus parties may freely provide for consequent contingency by, for example, agreements to agree, or that one party may fix price in his or her discretion. Provided the parties had the intention to conclude a contract, such contracts can in no way be deemed *ab initio* void. *Should* such a contract be challenged in court, and should it be established that despite their valid contract, there is no settled price, the court may find for a reasonable price; accordingly, no problems of *practical enforcement* need necessarily be experienced by the courts as a result of the law allowing the parties such flexibility regarding price.

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828 Williston, ibid., at 326.

South African contract law, of course, does not take as a point of departure that in a contract of sale, there need not be settlement on price. Accordingly, in adaptation mechanisms such as those mentioned above, the onus is rather on the parties to construct mechanisms that fit within the scope allowed them by the rule of *pretium certum* (i.e. that there must be settlement on price). Consequently, South African contractants will invariably not enjoy the same flexibility in constructing adaptation mechanisms to the extent enjoyed by contractants in the United States.

On the other hand, what can be learnt from the American approach, and indeed applied in this country, is the importance attached to the intentions of the parties. This has been clearly demonstrated by the lengthy citation of remarks by Williston under **7 2 1**, and in particular, that § 2-305 firstly requires that the courts dispose of the relatively straightforward question of the intention of the parties, before establishing the price by reference back to the Code. The effect of this emphasis on price adaptation can be practically illustrated by its application to the facts of *H Merks & Co (Pty) Ltd v The B-M Group (Pty) Ltd and Another*.[829]

In the *Merks* case, if § 2-305 were of application, one would firstly note that no price had been settled upon. Accordingly, the task of the court would then be to establish if the parties intended to conclude a contract, despite the absence of a settled price. An examination of this intention was made in some detail in **6 5 5**; suffice to say that given especially the overall intention to remain in a contractual relationship as parties to a concessionaire agreement for a minimum of five years, it can be strongly argued that the parties intended, each year, to enter into a (fresh) contract of sale, and that agreement on price increases was not to stand in the way of this primary intention.

Accordingly, having established the intention to enter into a (fresh) contract of sale each consecutive year, price may now be found by reference back to the Code. Here it must be noted that the parties specifically included a contractual provision that 'price may be increased by mutual agreement from time to time'. Thus the court, in terms of § 2-305 (1) (b), may hold there to be a reasonable price at the time of delivery as 'the price is left to be agreed by the parties and they [had] fail[ed] to agree'. On the other hand, were the court to conclude differently to the analysis in **6 5 5** with regard to the intentions of the parties, a court could also, in terms of § 2-305 (4), hold that the parties did not intend to be bound unless they had agreed in the manner for which they had made provision. The important point, however, is that, in both cases, the intention of the parties is the decisive factor. In the *Merks* judgement, for instance, it appears that part of the reason why the court was loathe to find that the lack of agreement on price did *not* lead to the termination of the contractual relationship was that, if it found that the agreement continued, it did not know how it was then to enforce it.[830] The concern of having to find 'a reasonable certain basis for granting an appropriate remedy' lay more heavily, perhaps, than concern for giving effect to the intentions of the parties.

Of course one could point out that, in contrast to a South African court, an American court can afford to stress giving effect to the intentions of the parties, and not to be overly concerned with how the courts should give effect to a contract of sale which contains no settled price; after all, § 2-305 provides, in any event, the remedy of a reasonable price. But this is to miss

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829 1996 2 SA 225 (A); for a detailed analysis of this case, see in general 6 5 above.
830 See especially 235B-D.

the point. After all, it should be remembered that the intention of the parties is equally strongly emphasised in § 2-304 (3), and there no 'appropriate remedy' is provided *ex lege*, as done in § 2-305 (1). The point is merely that the Uniform Commercial Code achieves a balance between giving effect to the intentions of the parties and requiring, for practicality's sake, a reasonably certain basis for an appropriate remedy. It has been argued strongly above that this balance should be achieved in our own law. This would also lead to a more accommodating approach by our courts to price adaptation.

Finally, the manner in which UCC § 2-305 (1) *assumes* the parties intend to contract on the basis of a reasonable price, in the absence of any other intention,[831] is also indicative. For as has been pointed out before,[832] if our courts firstly make an adequate examination of the parties' intentions, it should be able to make a similar assumption regarding whether it too may find for a reasonable price. Thus our law may not have the *ex lege* imposition of a reasonable price available in § 2-305 (1), but then it does not necessarily need it. For South African courts, having determined firstly that the parties intend to contract despite the apparent uncertainty of price, and being thus obliged to strain to find for a contract on terms enforceable by itself, could thus possibly find for *tacit* agreement on a reasonable price. In this way, it could find 'a reasonably certain basis for an appropriate remedy'. The doubts raised in *Merks* about the possibility of a sale at a reasonable price have, in any event, long since been shown to be unconvincing.[833]

7 2 3 The challenge of the Uniform Commercial Code

An analysis of §§ 2-204 and 2-305 of the Uniform Commercial Code indicates the balance achieved by the Code between giving effect to the principle of party autonomy, and the simultaneous recognition that, at least for reasons of practicality, a contract of sale must contain a price that may be enforceable by the courts. Thus the decisive perspective as to what constitutes a certain price is neither entirely the parties' nor the courts'. Parties are given the freedom to agree on whatever form of price term they so want, or to agree even upon nothing at all. Where, however, the contract of sale is required to be enforced by the court, and the price is not settled, the Uniform Commercial Code provides, in any event, for a reasonable one, in the absence of indications of an intention to the contrary.

Following the discussion of UCC § 2-204 at **7 2 1** above, it was suggested that South African courts, in applying the test for certainty, should firstly attempt to ascertain whether the parties, despite the apparent indefiniteness of terms, nonetheless intended to be bound by their agreement. If so, the courts should attempt to give effect to such agreement by straining to find for a reasonably certain basis for the enforcement of the agreement. As the test for certainty is currently expressed, the impression is created that the courts may progress to the second part of the test immediately i.e. that they may test whether the agreement is enforceable without an adequate enquiry as to the intention of the parties. In the final section, which follows immediately, it shall be seen to what extent recent South African case law confirms or denies this impression, and accordingly, whether the test for *pretium certum*

831 See also e.g. the English Sale of Goods Act 1979 s. 8.
832 See the discussion at e.g. 2 5 4 1 1 above.
833 See the discussion at 2 3 2 above.

requires some form of restatement.

7 3 Recent South African case law: the extent to which consideration is given to the intention of the parties

7 3 1 Edging towards a balance

As observed in the section above, the Uniform Commercial Code places particular emphasis on the intention of parties to be bound by their agreement, despite the apparent uncertainty of the agreement's terms. This emphasis is, however, balanced by the requirement that accompanying this intention, there should exist a reasonably certain basis for giving an appropriate remedy.

It has been likewise demonstrated in **1 1 3** that in South African contract law, there is nothing new in the approach to consider the intention of the parties in any examination of alleged vagueness of a term. Recently, in *Lewis v Oneanate (Pty) Ltd,* the Appellate Division has reiterated once more that in considering the question as to whether a contract is void for vagueness, regard should be had to the fact that at issue is a commercial document which has been executed by the parties with the clear intention that it should have commercial operation.[834] Even more recently, this approach appears to be broadly endorsed by Harms JA's majority judgement in *Namibian Minerals Corporation Ltd v Benguela Concessions Ltd*, where the judge of appeal observed:

> Once a Court is called upon to determine whether an agreement is fatally vague or not, it must have regard to a number of factual and policy considerations. These include the parties' initial desire to have entered into a binding legal relationship; that many contracts (such as sale, lease or partnership) are governed by legally implied terms and do not require much by way of agreement to be binding (cf *Pezzutto v Dreyer and Others* 1992 (3) SA 379 (A)); that many agreements contain tacit terms (such as those relating to reasonableness); that language is inherently flexible and should be approached sensibly and fairly; that contracts are not concluded on the supposition that there will be litigation; and that the Court should strive to uphold - and not destroy - bargains.[835]

This is clearly a sensible approach. By the recognition of terms implied by law, and the possible tacit implication of reasonableness, a contract may be saved from an unnecessary fatal uncertainty. More particularly, Harms JA shows an appreciation for the significance of the initial desire of the parties to enter into binding contractual relations, and that the court should strive to uphold bargains. By remarking that parties do not contract on the supposition that there will be litigation (and that language is inherently flexible), Harms JA clearly recognises the obvious but not insignificant point that parties write their contracts for themselves, and not for the courts. Parties should not, after all, in the drafting of their contracts, be expected to keep one eye always on the courts. Thus there is, in fact, much to be said for all of these points, and they should provide valuable assistance to future courts faced

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834 1992 4 SA 811 (A) 818G-819I, and particularly 819E-F, where the dictum of Colman J in *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* 1964 1 SA 669 (W) is approved and applied.

835 1997 2 SA 548 (A) 561H-I.

with the question of uncertainty.

On the other hand, however, there are other indications in Harms JA's judgement that, all things considered, he is of the opinion that the approach to certainty should be defined essentially as an objective one, and that ultimately, the question remains whether the content of the alleged contract is enforceable by the courts. This is illustrated, firstly, in his remarking as follows:

> Businessmen are often content to conduct their affairs with only vague or incomplete agreements in hand. They tend to rely on hope, good spirits, *bona fides* and commercial expediency to make such agreements work. But when they are at loggerheads, it appears to be futile to consider whether they would have been able to do so.[836]

Ultimately, Harms JA suggests, where a term is in fact disputed, it is pointless to consider that the parties intended the contract to be binding, or considered the agreement as capable of implementation; in such cases, the problem is simply foisted upon the courts. It is understandable, then, that the test is one enquiring as to the enforceability of the term by the courts.

This is, of course, an important consideration. In American law, this factor is accorded consideration in the provision that whatever the intention of the parties, there must also exist a reasonably certain basis for the provision of an appropriate remedy. In § 2-305 this is largely accounted for by the Code providing for a reasonable price. Significantly, however, Harms JA also makes the following observation:

> In addition, the question of vagueness of an agreement is an objective consideration and it is of no avail to have regard to the subjective intentions and desires of the respective parties ...[837]

One questions, accordingly, whether the Appellate Division does itself any favours by returning to this insistence on an objective test. To say that it is of 'no avail' to have regard to the parties' subjective intentions is strongly stated. One's feeling might be that it destroys the balance towards which the judgement was edging in the list of factors initially mentioned by Harms JA. For yes, parties do at times believe themselves to be *ad idem*, and intend to be bound by their agreement, and yet not realise that in fact they have not reached consensus on price. In such cases, the courts should not be swayed by such an intention.[838] On the other hand, if the court finds that the intention of the parties is to be bound by their agreement, despite the apparent uncertainty of, for example, price, this may equally be an important indication that the parties are indeed *ad idem*. The court should therefore in such circumstances strain to find for a reasonably certain or ascertainable price, whether by tacit term, conduct or custom. This is surely the lesson of the Uniform Commercial Code. At the least, the intentions of the parties should be regarded as of such significance that the courts should refrain from continuing to describe the test for uncertainty or vagueness as objective.

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836 561G.

837 563A.

838 See e.g. *Lambons (Edms) Bpk v BMW (Edms) Bpk* 1997 4 SA 141 (SCA); *Titaco Projects (Pty) Ltd V AA Alloy Foundry (Pty) Ltd* 1996 3 SA 320 (W); *Kenilworth Palace Investments v Ingala and Another* 1984 2 SA 1 (C).

In sum, the Appellate Division should simply expressly recognise that an enquiry into the certainty of a term such as price is not such a simple task that it may tag the issue as objective. For there are clearly other factors - which Harms JA himself has recognised - which indicate that it is simplistic to continue to regard the test for certainty as, essentially, whether the term is enforceable by the courts. Harms JA's *dictum* cited immediately above, therefore, is unnecessary, and misleading, albeit possibly unintentionally so.

7 3 2 The minority judgement in Namibian Minerals: *the suggested approach*

In so far as it sets out the various factors to be considered when faced with the issue of uncertainty, the majority judgement in *Namibian Minerals Corporation Ltd v Benguela Concessions Ltd*[839] is undoubtedly a useful one. Where it falls back, however, would seem to be where it rather unexpectedly dismisses reference to the subjective intentions of the parties as of 'no avail'. In contrast, the minority judgement in this same decision endorses unequivocally an approach which places great stock on the intentions of the parties. Thus whilst a minority judgement, it is submitted that the approach of E M Grosskopf JA is illustrative.

Thus at issue in this case, amongst other points, was whether a so-called farm-in clause to certain diamond concession areas held by the respondent and granted to the appellant on the fulfilment of certain conditions was valid and not void for vagueness. As is clear from the case report and the remarks of E M Grosskopf JA, the respondent, following the granting of the farm-in clause, discovered it was no longer in its interests to permit the appellant to exercise its rights accruing from the clause, and thus denied that it was bound by it. This it did by its representative firstly tearing off from the original contractual documents pages on which the signatures appeared, and thus denying that its representative had signed them, and later by disputing the validity of the clause on the grounds of vagueness. E M Grosskopf JA held thus as follows:

> Before performing this exercise myself it is necessary to state some general principles. First, the parties clearly considered that the clause was capable of implementation. Even before the conclusion of the July agreement the appellant was claiming rights under the farm-in clause. Although there were disputes between the parties about its implementation (and, in particular, on what area in the South African concessions is 'of similar attraction' to the Namibian area), there was no suggestion from the respondent that the clause was too vague to be enforced. And, in August 1992 when the respondent wanted to get out of the contract, Wilson [a representative of the respondent] adopted the extreme expedient of mutilating the documents and falsely claiming that he had not signed them. Quite clearly, he had no doubt as to the contract's enforceability. Moreover, as I have already stated, the contention that the clause was void for vagueness was inserted into the respondent's plea by amendment and formed no part of the original formulation of the claim. We are here dealing with a lawyer's point rather than a matter of practical importance for businessmen. We should not be astute to destroy a contract which the parties seriously entered into and considered capable of implementation.[840]

Importantly, the judge of appeal clearly recognises the appeal to vagueness as a tactic of one

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839 1997 2 SA 548 (A).
840 556J-557D.

party to escape the consequences of his agreement by taking recourse in a technicality. The respondent in such a case attempts to exploit the discrepancy between what a court may view as uncertain and the possible view of the parties in this regard. In his minority judgement, however, E M Grosskopf JA ensures that such a discrepancy does not arise and is thus not exploited, by ensuring that his own view of what might be regarded as an uncertain term takes cognisance of that which the parties themselves would regard as uncertain. This he achieves by specifically taking into consideration the fact that the parties considered the clause capable of implementation.

This is regarded as an important factor by E M Grosskopf JA. Moreover, it is even one step beyond an enquiry as to whether the parties intended to be bound by the allegedly uncertain terms. Thus the judge of appeal remarks that one should not be astute to destroy a contract which the parties seriously entered into *and* considered capable of implementation. Parties may enter into contractual relationships with, from an objective viewpoint, only vague or incomplete agreements in hand and yet genuinely intend such an agreement to be binding. As noted by Harms JA in the majority judgement in the same case, parties thereafter tend to rely on hope, good faith and commercial expediency to make such an agreement work.[841] Thus the basis of such an intention may also be a misplaced confidence in the success of some later process of removing the vagueness and of making the term workable. Accordingly, while useful, the intentions of the parties alone cannot be regarded as a decisive indication that the term in question should not be regarded as irredeemably vague.

More useful therefore, may be an enquiry not merely with regard to whether the parties intended the disputed term to be binding, but with regard to whether the parties also believed the term to be capable of implementation.[842] The distinction between the two enquiries is, of course, merely one of degree. It is suggested, however, that the latter enquiry is the more focused one, and consequently, one that is more likely to give the court an indication that it too might be regard the term capable of enforcement. For the parties may intend the disputed term to be binding, but only in the sense of a general, well-meaning intent, one rooted in the abstract and not necessarily cognisant of its practical implications. A finding, on the other hand, that the parties considered the term capable of implementation indicates that to some extent, they have put their minds to the implications of the term in practice. Accordingly, if the parties regard the term as capable of implementation, the indication is a powerful one that so too should the courts. Thus the court would in such circumstances be obliged to delve deeply into all the circumstances governing the contract, including the possible existence of tacit terms, *naturalia*, custom, conduct, and other extrinsic evidence, in an effort to find for some reasonably certain basis upon which the term in question may be found enforceable.

This, in fact, is the approach taken thereafter by E M Grosskopf JA on the facts of the case. The farm-in clause is examined section for section, and eventually held not to render the contract void and unenforceable.[843] The pragmatic, party-orientated approach of E M

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841 At 561G, cited above.

842 See the similar approach in *Pezzutto v Dreyer and Others* 1992 3 SA 379 (A) 393A-B, and *Bantjies v Kuntze and Another* 1998 4 SA 201 (C) 206C-D.

843 It is, in fact, on the point of what is meant by an area of 'similar attraction', or more specifically, to whom it must be attractive, that the majority and minority judgements part ways. E M Grosskopf JA, at 559D, had no hesitation in holding that it must be attractive to a businessman proposing to

Grosskopf JA is most clearly illustrated by the following observations made by the judge. These were made in the course of determining whether reasonably certain effect could be given to that part of the farm-in clause which referred to the offering to the appellant of a farm-in right to a concession area 'of similar attraction':

> There is considerable evidence before us as to what the parties knew, believed and hoped about the Namibian concession area. Technical evidence could show what the attributes and potentialities are of any area offered in terms of the farm-in clause. Of course, the defects in the offered area would also have to be taken into account. Whether the South African area is, on balance, of similar attraction would be determined by weighing up all the different factors. Here, too, I expect technical evidence would be necessary. It does not in principle seem to me to be beyond the capacity of a Court to perform such an exercise. In a particular case it might of course be impossible to say on the evidence whether or not the offered area is of similar attraction to the Namibian area. In such a case the party burdened by the *onus* of proof would lose. I do not think, however, that similar attraction is intrinsically incapable of proof. And I would here repeat that the parties, who were intimately concerned with the technical and financial aspects of the respective concession areas, clearly entertained no doubt about the enforceability of the provision.[844]

With respect, the approach taken by E M Grosskopf JA is a most sound one, and one that bears repeating by all courts faced with an agreement hit by an alleged vagueness of term. This is especially so when recourse to the argument of vagueness has been made purely as, in the words of E M Grosskopf JA again, a lawyer's point, as a means of escaping a liability which has arisen from an agreement that party entered into with serious intent. In the *Namibian Minerals* case, E M Grosskopf JA does not discard the test traditionally followed by our courts for certainty. On the contrary, the test he applies is clearly whether the disputed term in question is capable of enforcement in the view of the court. At the same time, however, and to an equal extent, the judge takes direction from the fact that the parties themselves regarded the disputed term as capable of implementation. Thus one perceives a determination on the part of the judge to find, if at all possible, that the term is likewise sufficiently certain as to be enforceable by the court.

Thus the minority judgement in *Namibian Minerals Corporation Ltd v Benguela Concessions Ltd* achieves a balance. On the one hand, there is recognition that the agreement belongs to the parties. Thus there is the realisation that the agreement ought not be hi-jacked by subjecting it to a requirement of certainty that fails to consider that the parties, whatever the courts might *prima facie* think, regard the terms of their agreement as sufficiently certain so as to be capable of implementation. Such an approach is one rooted in the principle of autonomy fundamental to our law; that is, that a contract is ultimately the tool of the parties. On the other hand, the perspective of the court is likewise not neglected. Thus consideration is given to the court's concern that as the body which, in the final instance, must be able to attach to

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invest in the area; his test is thus objective (i.e. the reasonable businessman test) and allows him to hold that by admitting technical evidence, 'similar attraction' is capable of proof. Harms JA, on the other hand (at 567D-568I), found that it had to be interpreted as meaning a subjective attraction i.e. the degree to which it would be found attractive to other investors was irrelevant; it simply had to be attractive to the party in question, i.e. Namco. As this was not objectively ascertainable, this term resulted in the contract being void for vagueness.

[844] 559F-H.

the disputed term precision, it may be required to give judicial effect to the contract containing that term. Admittedly, the court may have to work harder as it endeavours to find that such precision does indeed attach to the term - but then, the contract is the parties, and the courts are, if possible, to serve the genuine intentions of the parties. It is not to be the other way around. Furthermore, E M Grosskopf JA will clearly also draw a line where, despite all diligent efforts, the court finds the term in question is not capable of enforcement.

7 4 Certainty reconsidered: concluding remarks

In § 2-204 (3) of the Uniform Commercial Code, a balance is achieved between giving effect to the intentions of the parties, despite the apparent uncertainty of terms, and the need, nonetheless, to be able to find a reasonably certain basis for an appropriate remedy, before the court will give effect to the contract in question. South African law does not have any equivalent of § 2-204 (3). What it does have, however, is a test which states that in determining whether a term in a contract, such as price, is certain or objectively ascertainable, it must be seen whether that term is capable of enforcement by the courts. Thus in the current expression of our test, the need to find a reasonably certain basis for enforcement of the term predominates.

In this chapter, therefore, it has been asked whether this test should be restated. In the *statement* of this test, the answer is, possibly, yes. As has been demonstrated, the intention of the parties to enter into a binding contract, and especially their belief that a price is capable of implementation, are important considerations. Not only may such factors be important indications that a reasonably certain price can be found, but in terms of the principle of autonomy, the courts should attempt to give effect to the intentions of the parties. These considerations need to be reflected in the expression of this test. Thus it is suggested that the test should be restated to hold that a term will be held as uncertain where, having given due regard to the intentions of the parties, the court is still unable to find a reasonably certain basis to give enforcement to this term.

On the other hand, if the judgement of E M Grosskopf JA in *Namibian Minerals Corporation Ltd v Benguela Concessions Ltd* may in any way be taken as a standard, and if courts in the future are prepared to take their cue from the latter, there is no need to call for any change in the *exercise* of the test. As demonstrated in this judgement, all relevant factors can already be taken into account so as to achieve a balance between giving effect to the intentions of the parties, whilst not losing sight of the practical challenge of giving effect to an apparently uncertain term.

Thus if our test on certainty could (and perhaps in the way suggested above) be restated so as to emphasise that the question of certainty is not simply one that can be solved by - to overstate the matter somewhat - the casual glance of our courts, our law will have moved some way to ensuring that the requirement of certainty is never again used as a lawyer's point, or to thwart needlessly attempts at price adaptation. For at the courts' disposal, moreover, are increasing means of finding for, in the language of the Uniform Commercial Code, reasonably certain bases for providing appropriate remedies. Previous chapters have indicated this: the

validity of sale at a reasonable price, for example;[845] the implication of reasonableness, whether tacitly or *ex lege*, and whether in the case of a unilateral power[846] or whether under circumstances akin to those found in *H Merks & Co (Pty) Ltd v The B-M Group (Pty) Ltd and Another*;[847] or perhaps in the recognition that a court may substitute its own reasonable price following the distinction it has made between essential and non-essential price ascertainment mechanisms, as revealed in *Sudbrook Trading Estate Ltd v Eggleton*.[848] Increasingly, therefore, where a court has determined that the parties intend to enter into a binding contractual relationship despite the apparent uncertainty of terms, there are plentiful means at the courts' disposal to ensure that this intention can be given effect to, and the contract saved. Thus (i) a new emphasis upon the intentions of the parties, and (ii) a greater willingness to look beyond for some reasonably certain basis for a remedy, can only be good news for parties who attempt to provide for price adaptation. For too long, perhaps, certainty may have been a choke upon parties' efforts to arrange their affairs with the flexibility it seems is so often required in modern commerce.

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845 At 2 3 2 above.
846 At 6 4 above.
847 1996 2 SA 225 (A); at 6 5 5 above.
848 [1983] 1 AC 444, [1982] 3 All ER 1 (HL); at 2 5 above.

CHAPTER EIGHT: CONCLUSION

From a distance, the rule of *pretium certum* in the South African law of sale appears clear-cut and uncontroversial. This impression misleads.

On the one hand, a lack of certainty as to price may indeed indicate that the parties are not *ad idem* on an *essentialé* of sale, and do not wish to be bound until agreement is in fact reached. So too, the court, as the institution which in the final instance must enforce obligations arising from a contract, must be in a position to give precise effect to such liability. In this enquiry, however, while the test remains whether price agreed upon is sufficiently certain as to be enforceable by the courts, the courts should not lose sight of the fact that while their view of certainty may differ from that of the parties, the parties may, nonetheless, regard price as capable of implementation. As the courts are obliged, where possible, to give effect to the intentions of the parties, the courts should strain to find a reasonably certain basis for an enforceable price. Not to do so, and to be content with an enquiry that fails to move beyond the *prima facie* view of the court as to certainty, neglects to respect the reality that the parties may well have reached agreement. In striving to find such agreement, and a reasonably certain basis for an enforceable price, the court does the parties no favour: it is its duty to do so, as required by the principle of party autonomy underlying our law of contract. In this regard, the approach of the minority judgement in *Namibian Minerals Corporation Ltd v Benguela Concessions Ltd* should be followed.[849] It may also be worthwhile to restate the test for certainty so as to emphasise that significance of the intentions of the parties in this enquiry.

On the other hand, however, it must also be acknowledged that a buyer or seller may be loathe to fix a price with certainty from outset. Contingencies may arise in the period following the fixing of price which may upset the balance between performance and counter-performance established by the parties, as represented by the exchange of goods for the price. Parties accordingly attempt to import a measure of price adaptation; that is, they attempt to provide for a price which, though to be found in a contract of sale which continues to be binding, may be adjusted to provide for later contingency, and to a degree with regard to which both parties would find satisfactory. In this regard, price adaptation has traditionally been provided for by the application of the rule that price need not be immediately certain, but may be determined later by a process of objective ascertainment. The usual example here is that of a price escalation clause. This study, however, has indicated that price adaptation mechanisms have increasingly become more sophisticated, and have made use of measures which, inevitably, have been drawn into conflict with any rigid application of the rule that price must be objectively determinable, and the related prohibitions against agreements to agree and price-setting by one party alone.

South Africa, unlike certain overseas jurisdictions, possesses no specific legislation or doctrine which explicitly provides for the adaptation of price. On the other hand, it has been demonstrated that parties themselves have not been slow in creating their own means of

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849 1997 2 SA 548 (A).

importing price adaptation. Moreover, while in some textbooks and case law the rule of *pretium certum* continues, as a principle, to be cited without qualification, one detects in case law that in particular circumstances, our courts are willing to be not overly rigid in its application of the latter rule where this will deprive parties of the flexibility, typical of price adaptation, which they wish to import with regard to price. Such an accommodating attitude, and a tendency not to be too astute in striking down such contracts for uncertainty, is to be encouraged; moreover, such an attitude is, in the view of McKendrick, all that is necessary for an adequate party-managed response to changing circumstances and contingencies which hit price.[850] This attitude in South African case law is evident, for example, in moves towards the recognition of sale at a reasonable price, of the acceptance of unilateral powers of price adjustment where subject to objective limitations, and the greater willingness to imply, whether tacitly or by law, the standard of reasonableness so as to bring a price within the scope of objective ascertainment. Furthermore, on an application of the distinction between essential and non-essential price ascertainment machinery as revealed in the House of Lords decision of *Sudbrook Trading Estate Ltd v Eggleton*,[851] South African courts may also find themselves in a position to intervene and substitute a reasonable price more often, and in cases falling outside of those involving third parties, in instances where the agreed upon price ascertainment machinery has failed.

Such developments in our law take cognisance of the fact that today, buyer and seller contract in an uncertain commercial world, and that any application of the rule of *pretium certum* which fails to appreciate such modern circumstances, permits the rule to be afforded a significance never intended it. After all, in the final instance, a contract of sale is a tool to be utilised by the buyer and seller for the furtherance of their individual interests. The rule of *pretium certum* undoubtedly contributes to the efficacy of this type of contract. But where any objections the rule raises to new forms of price ascertainment or new forms of price adaptation are satisfactorily provided for, it should not be permitted to obstruct an arrangement on price agreed upon by the parties and entered into with seriousness.

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850 McKendrick *Regulation* 311.
851 [1983] 1 AC 444, [1982] 3 All ER 1.